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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Petitioner,

v.

THE UNITED STATES,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Federal Ciruit has violated Petitioner White Mountain Apache Tribe's Constitutional right to judicial due process by affirming the orders of the Court of Federal Claims which denied Petitioner Tribe its repeated efforts to be heard respecting its valid claims to title to 16,090 acres of land situated within Tribe's Fort Apache Indian Reservation which are presently illegally occupied by the United States Trustee which is now and has been utilizing those 16,090 acres of land for its own use and benefit?

Whether the United States Court of Appeals for the Federal Circuit has violated Petitioner White Mountain Apache Tribe's Constitutional right to due process by affirming the decision of the Court of Federal Claims which—having found that the United States was liable for accelerated erosion which had its inception in 1912, if not before, and is ongoing today destroying Tribe's reservation—nevertheless, refused to award damages (1) for the accelerated erosion antecedent to August 13, 1946, the terminal date for claims pursuant to the Indian Claims Commission Act, and (2) for the accelerated erosion which continues to date?

LIST OF THE PARTIES

A list of all parties to the proceedings in the Court whose judgment is sought to be reviewed [substituted parties]:

Petitioner White Mountain Apache Tribe of Arizona, Fort Apache Indian Reservation and The United States of America, Trustee for Petitioner White Mountain Apache Tribe.

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For The Federal Circuit

Petitioner White Mountain Apache Tribe respectfully prays the Court that a writ of certiorari issue to review the unpublished Opinion of the United States Court of Appeals for the Federal Circuit which was rendered on August 17, 1993, a timely petition for rehearing having been denied by the Court of Appeals on September 13, 1993.

OPINIONS BELOW

The United States Court of Federal Claims entered its Opinion on February 6, 1987, and selected pages from that Opinion are Appendix 4 of this Petition.[1] Petitioner White

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[1] Appendix 4, *White Mountain Apache Tribe of Arizona v. The United States*, Defendant, No. 22-H, 11 Ct.Fed.Cl. 614 (1987) selected pages pertaining to issues presented here.

Mountain Apache Tribe appealed the February 6, 1987 Opinion of the Court of Federal Claims to the United States Court of Appeals for the Federal Circuit. That Court of Appeals rendered its Opinion on August 17, 1993, which Opinion is Appendix 1 of this Petition.[2] The Court of Appeals on September 13, 1993, entered its Order denying Petitioner's request for rehearing. That Order of Denial is Appendix 1A of this Petition.[3]

JURISDICTION

The Opinion of the United States Court of Appeals for the Federal Circuit was rendered August 17, 1993 and the Petition for Rehearing was denied September 13, 1993. The 90-day period for filing a petition for a writ of certiorari would have expired December 13, 1993. Petitioner Tribe's motion for an extension of time in which to file this petition for a writ of certiorari was granted on December 1, 1993, extending the time for that filing to and including January 11, 1994. The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power . . . to regulate Commerce . . . with the Indian Tribes; . . .

Constitution of the United States, Amendment [V], Right of Persons.

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall

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[2] Appendix 1, Unpublished Opinion of the United States Court of Appeals for the Federal Circuit, Appeal No. 93-5018.

[3] Appendix 1A, Order by U.S. Court of Appeals for the Federal Circuit denying Petitioner's request for rehearing.

private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. 70(a), The Indian Claims Commission Act.

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian Tribe . . . ; (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States were subject to suit, . . . (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

28 U.S.C. 1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods (1) By writ of certiorari granting upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

STATEMENT OF THE CASE

Petitioner White Mountain Apache Tribe, Whiteriver, Arizona, is a duly organized Indian Tribe recognized by the Secretary of the Interior. Petitioner Tribe invoked the

jurisdiction of the then Indian Claims Commission[4] seeking to recover damages that it had experienced due to the mismanagement of Petitioner Tribe's Fort Apache Indian Reservation by the United States Trustee.

Having been repeatedly denied its Constitutional right to judicial due process, the right to a full and fair hearing before courts of competent jurisdiction respecting the damages Tribe has sustained including the refusal of the courts below to enforce the Compromise Settlement of 1972, due to the illegal seizure and use of Petitioner's invaluable land by the United States Trustee, and the ongoing destruction of Tribe's Fort Apache Reservation due to the Trustee's mismanagement, concerning which Petitioner Tribe has been denied judicial relief. Petitioner White Mountain Apache Tribe prays the Court to grant Tribe's petition for a writ of certiorari thereby assuring that the Tribe's Constitutional rights to due process shall be preserved respecting:

(1) The Opinion of the United States Court of Appeals for the Federal Circuit[5] affirming the decisions and orders by the Court of Federal Claims[6] denying Petitioner Tribe's

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[4] Suit was authorized by the Indian Claims Commission Act of August 13, 1946, Pub.L. No. 79-726, § 2, 60 Stat. 1049, 1050 as amended, 25 U.S.C. § 70a (1976) (omitted from Code pursuant to Commission terminated on September 30, 1978); thereafter jurisdiction continued in the then United States Claims Court, now the United States Court of Federal Claims (See Appendix 4, p. 16a for full jurisdictional statement).

[5] Appendix 1, p. 1a-3a, The unpublished opinion of the United States Court of Appeals for the Federal Circuit, dated August 17, 1993, in the case of *White Mountain Apache Tribe v. United States;* Appendix 1A, p. 4a, Order dated September 13, 1993 of the Court of Appeals for the Federal Circuit denying Tribe's Petition for a Rehearing Respecting August 17, 1993 Opinion.

[6] Appendix 2, p. 5a-6a, Order of the United States Court of Federal Claims, filed December 15, 1987, denying the Tribe the right to be heard respecting Tribe's claim to title to 16,090 acres of land within Tribe's Fort Apache Indian Reservation but permitting the Tribe to

Constitutional right to judicial due process in seeking to have enforced the Compromise Settlement of 1972 which adjudged and decreed Tribe's valid claims to title to 16,090 acres[7] of Petitioner Tribe's invaluable forests and grazing lands within Tribe's reservation illegally seized by the Trustee.

(2) The Opinion of the United States Court of Appeals for the Federal Circuit[8] affirming the refusal of the Court of Federal Claims[9] to award damages to Petitioner Tribe for the ongoing destruction of Petitioner Tribe's Fort Apache Indian Reservation by reason of accelerated erosion and the consequences thereof concerning which that court explicitly found that the United States Trustee was liable.[10]

I. SUMMARY OF RELEVANT FACTS

The Subject Res—The Fort Apache Indian Reservation

The trust relationship which exists between Petitioner Tribe and the United States of America was effectively established when President Grant proclaimed the November 9, 1871 Executive Order[11] which carved from Tribe's ancient ancestral domain the White Mountain Apache Indian Reservation. Altruism was not a factor in the assumption by the United States of America of the status of a Trustee for Petitioner Tribe. To the contrary, the United States was the prime beneficiary of the early ending of the protracted and costly war with the Western

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file and make part of the record the Affidavit of Expert Elmer M. Clark respecting Tribe's title to that land.

[7] Appendix 3, Affidavit of Expert Elmer M. Clark, dated March 3, 1987 establishing Tribe's claim to title to the 16,090 acres, p. 9a.

[8] Appendix 1, p. 1a-3a.

[9] Appendix 2, p. 5a-6a.

[10] Appendix 4, 11 Cl.Ct. 614, 659 (1987), p 46a.

[11] Appendix 5, Executive Order, November 9, 1871, p. 67a.

Apaches[12] which was achieved by the 1871 Executive Order providing Petitioner Tribe with a permanent home and abiding place which is now being destroyed by accelerated erosion for which the Court of Federal Claims found the Trustee liable and the Federal Circuit affirmed.

A critical factor in the establishment of Petitioner Tribe's White Mountain Apache Indian Reservation was the designation of the watershed divide between the Salt and Little Colorado Rivers—a conspicuous and well known natural monument—as the northern boundary of Tribe's reservation.[13] That natural monument was referred to in the November 9, 1871 Executive Order as "the south edge of the Black Mesa"[14] and was likewise referred to in the December 14, 1872 Executive Order which enlarged Tribe's reservation.[15] Thereafter, Congress, by the Act of June 7, 1897[16] severed Petitioner Tribe's reservation from that of the San Carlos Reservation designating it as the Fort Apache Indian Reservation, without any change being made in the northern boundary of Tribe's reservation.

The Fort Apache Indian Reservation, in the year 1897, can best be described as a treasure of immense value. As found by the Court of Federal Claims:

> The Fort Apache Indian Reservation contains 1,664,289 acres of land potentionally suitable for the grazing of livestock—virtually the entire reservation.[17]

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[12] Appendix 6, Selected pages, 21 Ind.Cl.Comm. 189 (1969), Finding 10, American Period, p. 72a.

[13] Appendix 3, p. 9a; Compromise Settlement, Appendix 10, p. 87a to 94a.

[14] Appendix 5, Executive Order, November 9, 1871, p. 67a.

[15] Appendix 7, Executive Order of December 14, 1972, p. 77a.

[16] Appendix 8, Act of Congress dated June 7, 1897 (30 Stat. 62); (1 Kappler 86), p. 79a.

[17] Appendix 4, p. 21a.

As found by the Court of Federal Claims, the reservation was described as having "... excellent grass for grazing purposes ...."[18] It was likewise found by the Court of Federal Claims that Petitioner Tribe's reservation "... is forested over 1,061,000 of its acres, more than 685,000 acres of which are commercial forest."[19] This petition is on the background of a virtual destruction of Tribe's reservation, the subject *res*—a reservation of incalculable value retained by Petitioner Tribe as a home and abiding place—which Petitioner Tribe asserts has been systematically and intentionally mismanaged by the United States Trustee. For example, the Trustee has illegally seized 16,090 acres of Tribe's invaluable land, a substantial portion of which was comprised of ponderosa pine forests which the trial court found does not produce "... merchantable quality for lumber until it reaches the age of 130-150 years. At younger ages its only harvestable value is as pulpwood."[20] Yet the Trustee virtually clearcut that ponderosa pine forest and retained the proceeds for its own benefit. Respecting the balance of Tribe's reservation, the Court of Federal Claims found that the Trustee was liable for the accelerated erosion which Petitioner Tribe proved is ongoing today with the attendant severe and ever-expanding damages to which Petitioner Tribe has been subjected, all as will be subequently reviewed and documented.[21]

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[18] *Ibid.*

[19] *Ibid.*, p. 62a.

[20] *Ibid.*

[21] *Infra.*, p. 14, *et seq.*

II. NORTHERN BOUNDARY OF PETITIONER TRIBE'S RESERVATION AS DESIGNATED BY EXECUTIVE ORDERS OF 1871 AND 1872

A. The Trustee's Erroneous Survey of Tribe's Northern Boundary

The United States Trustee in 1887, having established the northern boundary of Tribe's reservation as the watershed divide between the Salt and Little Colorado Rivers, directed United States Deputy Surveyor Wallace, an agent of the trustee, to survey that boundary. The instructions to Wallace were specific: Wallace was to establish the northeast corner of Tribe's reservation[22] and from that initial point of survey, Wallace was directed to ". . . run in a Westerly direction following the Southern edge of the Black Mesa, as near as practicable,"[23] to a point due north of Sombrero or Plumoso Butte, at which point Wallace was required to establish the northwest corner of the reservation.

The record establishes that Wallace, without reason or justification, departed from the southern edge of the Black Mesa—the watershed divide—with the result that he excluded from Tribe's reservation 3500 acres in the first 100 miles of his survey.[24] Substantial portions of those 3500 acres excluded from Tribe's reservation were invaluable ponderosa pine forests which, due to those errors, were located within the Trustee's Sitgreaves National Forest or the Apache National Forest. At milepost 98 Wallace, in clear violation of his explicit instructions, again left the watershed divide for a distance of 22 miles departing a maximum of 3 miles from that divide. By that violation of his instructions, Wallace excluded from Tribe's reservation 12,590 acres of invaluable ponderosa pine forests

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[22] Appendix 3, Affidavit of Elmer M. CLark, p. 9a-10a.

[23] *Ibid.*, p. 10a.

[24] *Ibid.*, p. 9a.

in a single tract of land,[25] thus adding that acreage to what is now referred to as the Trustee's Sitgreaves National Forest. There is graphically displayed in Plate I below, the disastrous consequences of the erroneous departure by the Wallace survey from the south edge of the Black Mesa for the last twenty miles of the designated natural monument which comprises the northern boundary of Tribe's reservation.

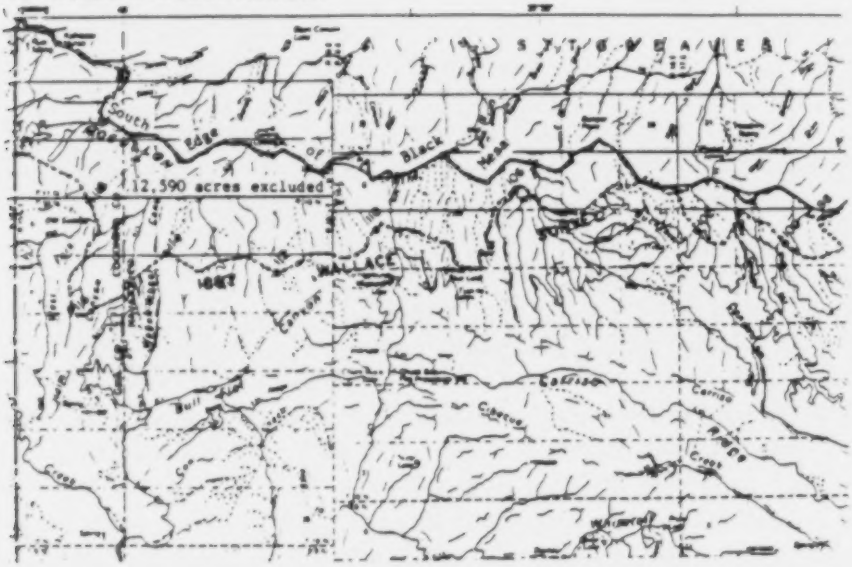

PLATE I

Plate I establishes the single most important fact in this phase of Petitioner Tribe's statement which is: The Northern Boundary of Tribe's reservation is the watershed divide between the Salt and Little Colorado Rivers Drainages. As a result, all of the tributaries of the Salt River are south of that divide, a fact graphically displayed in the upper right hand segment of the Plate set forth in

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[25] *Ibid.*, Plate I is limited to 12,590 acres of lands excluded from the Reservation by the Trustee's erroneous survey. Space did not permit graphically to display the several separate departures by Wallace from the watershed divide up to mile post No. 98 which resulted in the exclusion of 3500 acres of Tribe's reservation.

the Opinion of the Court of Federal Claims.[26] As shown there, the principal tributaries of the Salt River within the Tribe's reservation—Canyon Creek, Cibecue Creek, Carrizo Creek, and the Whiteriver—all rise within Tribe's Reservation south of the south edge of the Black Mesa, the watershed divide. It will be observed on Plate I above that the erroneous Wallace survey line severs the drainages of Canyon Creek, Cibecue Creek, and Carrizo Creek. By that mislocation of the northern boundary of Tribe's reservation, the erroneous Wallace line misrepresents the upper areas of those drainages as being part of the Little Colorado River Drainage—a physical impossibility. As a consequence, the reliance by the United States Trustee upon the Wallace survey line as the predicate for the illegal seizure of Tribe's 16,090 acres is wholly irrational and must be rejected.

B. Trustee's Title Opinion and Compromise Settlement

In an Opinion dated June 12, 1967 from the Solicitor's Office of the Department of the Interior[27] sustaining the 1887 Wallace survey, it is concluded that the error made in that survey, which is up to three (3) miles in width and 22 miles in length, excluding from Tribe's reservation 12,590 acres of ponderosa pine forests, was *not* a gross error. The Trustee's June 12, 1967 Opinion fails to take cognizance of the fact that the "south edge of the Black Mesa" was designated the northern boundary of Tribe's reservation—all as provided for in the Executive Orders of 1871 and 1872 creating Tribe's reservation. That designated northern boundary is the watershed divide between the Salt and Little Colorado Rivers, a well known and well defined natural monument. The Trustee in the June 12, 1967 Opinion seeks to justify the Wallace de-

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[26] Appendix 4, p. 19a.

[27] Appendix 9, p. 80a, Opinion of the Solicitor's Office, Department of the Interior, dated June 12, 1967.

parture from the watershed divide by a series of unsupportable conclusions. The most serious of those conclusions is the failure to recognize that the erroneous survey could not change the northern boundary of Tribe's reservation designated by the 1871 and 1872 Executive Orders which is the natural monument—the watershed divide between the Salt and Little Colorado Rivers.[28] Confirmatory of Petitioner Tribe's claim to title to the 16,090 acres of land within Tribe's reservation is this June 27, 1969 Finding by the Indian Claims Commission:

> . . . the United States took from the Western Apache Indians [The Petitioner] their Indian title to all of their aboriginal lands located *outside of the boundaries of the reservation established by the Executive Orders of November 9, 1871 and December 14, 1872.*[29]

Thereafter, the Indian Claims Commission approved the Compromise Settlement of September 12, 1972, declaring the lands "outside" of Tribe's reservation were taken by the United States Trustee which, in effect, declares that the lands within the reservation, including the 16,090 acres, were not taken but rather title to those lands remained in Petitioner Tribe, as is contended here by the Tribe.

Irrespective of the explicit language in the Executive Orders establishing the northern boundary of Tribe's reservation as the watershed divide between the Salt and Little Colorado River Drainages and the Compromise Settlement confirming that boundary, the United States Trustee has adamantly relied upon the erroneous Wallace survey for its illegal occupancy of 16,090 acres of Petitioner lands within Tribe's Fort Apache Indian Reservation.

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[28] *See Infra.*, p. 20, *et seq.*

[29] Appendix 6, p. 75a, 21 Ind.Cl.Comm. 189 (1969), Finding 12. (Emphasis supplied).

C. Denial by Court of Federal Claims of Tribe's Right To Be Heard Affirmed by Federal Circuit

There was succinctly reviewed by the United States Court of Appeals for the Federal Circuit in its May 10, 1988 Order Petitioner Tribe's efforts in its June 19, 1987 motion to be heard in the Court of Federal Claims respecting the illegal occupancy by the United States Trustee of the 16,090 acres.[30] It was recognized, moreover, in the May 10, 1988 Order of the Federal Circuit that Petitioner Tribe had asserted that the lands in question were improperly excluded from the Tribe's reservation by reason of the erroneous Wallace survey reviewed above.[31] Having referred to the December 15, 1987 Order of the Court of Federal Claims denying Tribe's request to be heard respecting the 16,090 acres, the Federal Circuit declared that the December 15, 1987 Order of the Court of Federal Claims lacked finality and hence could not be appealed, adding nevertheless:

> The issue that the Tribe seeks to present on appeal will be fully reviewable in the course of any final appeal in Docket 22-H.

Petitioner Tribe, relying upon the Federal Circuit's May 10, 1988 Order, repeatedly attempted to be heard by the Court of Federal Claims. That court repeatedly denied those motions. The Federal Circuit—having originally declared that Tribe's claims "on appeal will be reviewable"—departed from that initial ruling and affirmed the denial of Tribe's right to be heard respecting its claim to title to 16,090 acres leaving the Tribe without remedy or recourse giving rise to this petition.[32]

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[30] Appendix 11, p. 95-97a.

[31] Supra., p. 8, *et seq.*

[32] Appendix 11, p. 97a; Appendix 13, p. 101a-103a; Appendix 14, p. 104a-105a.

D. Denial of Tribe's Constitutional Right to Judicial Due Process of Law

Having been repeatedly denied its right to have enforced the Compromise Settlement of 1972 and its right to be heard respecting the damages Petitioner Tribe had sustained due to the illegal occupancy by the United States Trustee of Tribe's 16,090 acres, the Tribe appealed the final decisions in Docket 22-H.[33] In that appeal, the Tribe again referred to the fact that the Court of Federal Claims had repeatedly denied Tribe's efforts to be heard respecting its title to the 16,090 acres of land illegally occupied by the Trustee. It again prayed for an Order from the Federal Circuit requiring the Court of Federal Claims to decide the issue of whether the Compromise Settlement of 1972 affirmed Tribe's claims to title to the 16,090 acres and the damages the Tribe has sustained due to the illegal occupancy of those lands by the United States Trustee.

In its August 17, 1993 Opinion, in response to Tribe's appeal, the Federal Circuit recognized that the Court of Federal Claims did not "specifically" refer to Petitioner Tribe's claims respecting the 16,090 acres. Moreover, the only issue respecting that land was Tribe's renewed request for a hearing by the court below as to its claims to title to the 16,090 acres. There was not an issue before that court relative to the merits of Tribe's claim to title. Irrespective of that fact the Federal Circuit declared that the ". . . government persuasively explained that it [Tribe's claim] was resolved and subsumed in other proceedings." The Federal Circuit then delcared: "We . . . do not consider . . . further" Petitioner Tribe's request for an order requiring the Court of Federal Claims to grant the Tribe's

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[33] Appendix 4, p. 15a; *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614 (1987); and Appendix 15, p. 106a-108a, *White Mountain Apache Tribe v. United States*, 26 Claims Court, 466 (1992).

request for a full and fair hearing, giving rise to this petition.[34]

III. ACCELERATED EROSION AND ITS ONGOING DISASTROUS CONSEQUENCES

A. Trustee Held Liable for Accelerated Erosion

The Court of Federal Claims found as a fact that:

> Since the Government initiated and condoned the stocking conditions that produced overgrazed rangeland, in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted.[35]

Respecting that accelerated erosion for which the Trustee was declared liable, the Court of Federal Claims referred to the fact that "Plaintiff presented both historic and contemporary photographs depicting eroded land forms on the ranges." It is relevant that the Court of Federal Claims refers to the fact that it viewed ". . . for itself many eroded areas during its onsite inspection of the reservation,"[36] graphically displayed by Petitioner Tribe's photography. Seven of the reprints of those photos which are representative of the photos to which the Court of Federal Claims referred have been lodged by Petitioner Tribe with the Clerk of the Court. The Court is strongly urged to view those photographs and the environmental catastrophe for which the United States Trustee was held liable.

B. Accelerated Erosion—The Human Tragedy

The stark and tragic photos of the ongoing accelerated erosion on Tribe's reservation, which the Court of Federal Claims described in some detail, failed to include the hu-

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[34] Appendix 1, p. 2a.

[35] Appendix 4, p. 46a.

[36] *Ibid.*, p. 34a.

man tragedy which occurred and is ongoing.[37] Tracts of irrigated land along the numerous tributaries of the Salt River were maintained as a substantial source of food supply for the Tribe antecedent to the advent of the whiteman. By reason of that long history of irrigation, the Tribe was referred to as the "Agricultural Apaches." Those irrigated tracts received their supplies of Salt River water by means of irrigation ditches diverting directly from the tributary stream channels. The Court of Federal Claims found that the accelerated erosion by ". . . gouging the streambeds to levels below many of the existing irrigation channels,"[38] deprived the Apaches of their systems of irrigation with the attendant loss of a substantial share of their food supply. That court likewise found that the "end result" of the accelerated erosion was:

> . . . a loss of top soil from the range and the destruction of farmland as benches along streams are washed away or irrigation facilities are left stranded by ever-deepening streams.[39]

Further in regard to the consequences of the accelerated erosion, the Court of Federal Claims quoted extensively from a Report prepared in 1927 by the Bureau of Indian Affairs summarizing the destruction of Tribe's agricultural lands. These excerpts were taken by the court from that Report:

> . . . the storm waters come down off the mountains in such torrents that it destroys the agricultural land along the streambeds . . . . such terrible erosion that it has washed away at least 50% of the lands formerly cultivated by the Apache Indians . . . .[40]

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[37] Supra, p. 5, "The Subject Res."

[38] Appendix 4, p. 35a.

[39] *Ibid.*, p. 35a-36a.

[40] *Ibid.*, p. 34a.

Thereafter, the Report emphasizes that "[e]ach of the remaining 50 percent has been left so high and dry . . . that water cannot be put on it . . . ." The trial court added this statement from that Report:

> The agricultural products of the Indians have been reduced far over 50 percent through this cause since I have been here. It is a loss that no one can well appreciate until he sees it.[41]

C. Accelerated Erosion—Continuing Destruction of Tribe's Reservation

The accelerated erosion for which the Court of Federal Claims found the United States Trustee liable was and is a long term phenomenon which is continuing today. On the subject, Petitioner Tribe's Expert Geologist, Soil Scientist Mr. Kaczmarek, having comprehensively testified respecting the destruction by accelerated erosion of the Tribe's agricultural lands, expressed his conclusions as to the ongoing, irreparable damage being experienced today by the Tribe due to that accelerated erosion:

> . . . soil erosion on the range land surfaces is continuing at present at a rate at least equal to historic accelerated erosion and probably even more rapidly due to the continuing degradation of the vegetal cover of the reservation.[42] [See photos lodged with the Court]

Mr. Kaczmarek further describes in these graphic terms the consequences from the accelerated erosion throughout Tribe's reservation:

> . . . the damages to the reservation resources are continuing at a rate equal or in excess of the historic rates of resources degradation following

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[41] *Ibid.*

[42] Appendix 12, p. 100a, selected pages from Report of Investigations of the Processes of Accelerated Erosion.

> the initial surge of accelerated erosion occurring between 1912 and 1925.[43]

The Court of Federal Claims found that the United States Trustee agreed with the Tribe's assertions that the accelerated erosion is continuing to date, finding as a fact that "... the Government does not dispute that erosion has, *and is,* occurring on the reservation ...."[44]

Throughout the Court of Federal Claim's decision there is general acceptance that the damages experienced from accelerated erosion is and has been a continuing destructive force, adding that Tribe's expert, Mr. Kaczmarek, had constructed

> ... a credible explanation of how continued overgrazing could have reduced the vegetative cover of the range, [a] leaving bare spots on the soil surface, [b] increasing the aridity of the soil and [c] decreasing rainwater penetration of the soil.[45]

The continuing disastrous consequences stemming from the accelerated erosion were summarized by the Tribe's expert Kaczmarek when he reported to the Court of Federal Claims:

> Field investigations show that accelerated erosion *has proceeded* to the extend that the productivity of the land is diminished including approximately 427,811 acres of lands where the effects of the accelerated erosion have caused irreparable damage.[46]

Mr. Kaczmarek's declaration that the "... continuing degradation of the vegetal cover of the reservation"[47] is

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[43] *Ibid.*

[44] Appendix 4, p. 34a, (Emphasis supplied).

[45] *Ibid.*, p. 35a.

[46] Appendix 12, p. 99a.

[47] *Ibid.*, p. 100a.

fully corroborated by the Court of Federal Claims' finding that ". . . overgrazing changed the vegetative cover and topography of the rangeland to such an extent that top soil washed away, permanently eroding the landscape . . . ." Finally, Mr. Kaczmarek declared that the

> . . . accelerated erosion has continued on the Fort Apache Indian Reservation from at least as early as 1912 to the present and is continuing to damage reservation land, water, and range resources at an unabated rate . . . .[48]

Mr. Kaczmarek testified as to the ongoing accelerated erosion and expressed his opinion as to the costs of restoration which are wholly independent from the minimal damages calculated by the Court of Federal Claims for the reduction of the carrying capacity of the rangelands. He declared that the only means of preserving and protecting Tribe's reservation from further damages is a comprehensive program of restoration totalling as of that date $176,282,800.[49] The Federal Circuit affirmed the opinion of the court below which denied the Tribe any damages for the accelerated erosion irrespective of holding the Trustee liable for it.

ARGUMENT

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I. Denial of Judicial Due Process Respecting Illegal Use and Occupancy of Petitioner Tribe's Lands by United States Trustee

Throughout these proceedings, Petitioner Tribe has proved that the Executive Orders of 1871 and 1872 designated the northern boundary of Tribe's reservation as

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[48] Appendix 12, p. 99a.

[49] Appendix 16, p. 113a.

the "south edge of the Black Mesa," which is the watershed divide, a natural monument separating the Salt and Little Colorado River Drainages. At issue here is whether an erroneous survey of that boundary by the Trustee—excluding from Tribe's reservation 16,090 acres—can deprive Petition Tribe of title to that land, as declared by the Trustee's Opinion of June 12, 1967, all as reviewed above.[50]

In the Trustee's Opinion dated June 12, 1967,[51] it is concluded that the error made in that survey, which is up to three (3) miles in width and 22 miles in length, excluding from Tribe's reservation 12,590 acres of ponderosa pine forests, was "no 'gross error' "[52] and sustained the erroneous 1887 Wallace survey, thus justifying the illegal occupancy of those lands by the United States Trustee. The Trustee's Opinion further seeks to justify the erroneous Wallace survey by a series of unsupportable conclusions. It fails to recognize as, a matter of law, that the erroneous survey could not change the northern boundary of Tribe's reservation which is a designated natural monument. In the instructions to Wallace that he was "to follow the southern edge of the Black Mesa as near as practicable," the Trustee expresses this wholly untenable conclusion:

> This does not, however, indicate that the surveyor contravened his instructions to follow the south edge of the mesa as closely as practicable. The south edge of the Black Mesa would certainly not coincide with the crown of the mesa.[53]

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[50] *Supra.*, p. 10.

[51] Appendix 9, Opinion of the Solicitor's Office, Department of the Interior, dated June 12, 1967, p. 80a.

[52] *Ibid.*, p. 86a.

[53] Appendix 3, p. 10a.

That single statement mandates the complete rejection of the Trustee's Opinion evidencing a total lack of comprehension of both the facts and the controlling law. Rudimentary knowledge establishes without question that the south edge of the Black Mesa "is the crown of the mesa." Continuing irresponsibly, the Trustee's Opinion states that the south edge of the Black Mesa ". . . would necessarily be a line to the south of the highest elevation on the mesa,"[54] which, as repeatedly emphasized, is "the highest elevation on the mesa," the divide between the Salt and Little Colorado Rivers.

Further compounding the flagrant error in failing to comprehend that the south edge of the Black Mesa is the watershed divide, the Trustee's Opinion declares: "The surveyor was under no obligation to follow the divide as such. He was instructed to follow the south edge of the Black Mesa."[55] Again let it be stressed, the south edge of the Black Mesa *is* in fact the watershed divide and for the United States Trustee to adhere to the grossly erroneous June 12, 1967 Trustee's Opinion to deprive the Tribe of 16,090 acres of invaluable land partakes of a reprehensible distortion of both the facts and the law.

Where, as here, the Trustee designated the watershed divide as Tribe's northern boundary and thereafter departed from that boundary by an erroneous survey, the Court has repeatedly declared that: "The general rule is that in matters of boundaries calls for natural objects and fixed monuments control those for distances."[56] That concept was reiterated in the case of *Oklahoma v. Texas.*[57] Moreover, it is a governing principle of interpretation that: ". . . treaties with the Indians must be interpreted, as they

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[54] Appendix 9, p. 85a; *see* Appendix 3, p. 12a-13a.

[55] Appendix 9, p. 85a.

[56] *United States v. State Investment Co.*, 264 U.S. 206, 211 (1924).

[57] 268 U.S. 252, 256 (1925).

would have understood them . . . and any doubtful expressions in them should be resolved in the Indians' favor."[58] In a principal precedent respecting boundary disputes, the Court, in the case of *Northern Pacific Railroad Co. v. United States,*[59] intensively reviewed a boundary dispute involving the Yakima Indian Nation and in summary declared that:

> The main ridge necessarily had a definite and conspicuous individuality and needed no identification .... The Indians always claimed it as the western boundary of the Reservation and the earliest maps confirmed the claim."[60]

Thereafter, the Court enunciated the principle, which it is urged is controlling here:

> It was and is a natural and conspicuous landmark and was selected [as here] to define the immense area of land ceded by the Indians to the United States and the lesser though extensive tract reserved by them for their own use.[61]

From the opinion of the Ninth Circuit, that was affirmed by the Court, this most pertinent principle is enunciated which is controlling here:

> The United States owed the duty of trustee and guardian to preserve the rights of the Indians in the tract reserved, [as here] and by the treaty it agreed to survey the boundaries of the reservation, and set it apart for the exclusive use and benefit of the Indians. It [the United States] could

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[58] *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970) *Puyalup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251, 1257, N.6 (1983) *cert. den.* 465 U.S. 1058 (1984).

[59] 227 U.S. 325, 355 (1913).

[60] *Ibid.,* p. 360.

[61] *Ibid.,* p. 360-361.

> not therefore by an incorrect survey deprive the Indians of their right of occupation of the land within the legal boundaries of the reservation as established by the treaty [here the Executive Orders of 1871 and 1872].[62]

This caveat by the Court respecting the obligations of the United States Trustee to the Tribe is worth repeating here and is most applicable:

> If the government may control the cession and control the survey and by the actions of its agents [as here] *foreclose inquiry or determine it*, an easy means of rapacity is afforded, much quieter but as effectual as fraud.[63]

More recently the Ninth Circuit reviewed in depth the issues presented here and established a fully documented precedent utilizing these terms: ". . . there is a presumption against changing boundary lines to Indian Reservations," adding, moreover, that: "If there is a general rule, then it is that an incorrect survey may not be relied upon to reduce the legal boundaries of an Indian reservation."[64] Adopting the principles from the *Northern Pacific* Decisions, the Ninth Circuit declared:

> The United States 'could not . . . by an incorrect survey deprive the Indians of their right of occupation of the land within the legal boundaries of the reservation . . . .'[65]

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[62] *Northern Pacific Ry. Co. v. United States*, 191 F.2d 947, 958 (1911).

[63] *Northern Pacific R.R. Co. v. United States*, 227 U.S. 355, 366 (1913). (Empashis supplied)

[64] *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 118 (CA 9, 1980).

[65] *Ibid. See also United States v. Romaine*, 255 F. 253, 260 (CA 9, 1919); *United States v. Stotts*, 49 S.2d 619, 620 (U.S.D.C.W.D. Wash. 1930); *See* Vol. 6, *Commentaries on the Modern Law of Real Property*, p. 571, in which it is declared, Sec. 3044, "Superiority of Calls to

Predicated upon the principles enunciated and applied by the Court, the erroneous Wallace survey of 1887 could not divest the Tribe of its title to the 16,090 acres. Moreover, the patently erroneous June 12, 1967 Opinion of the Trustee could not and did not deprive the Tribe of its vested title to the lands in question.

II. Refusal of the Courts Below to Award Damages Having Declared Trustee Liable for Accelerated Erosion

The Court of Federal Claims declared that a fiduciary relationship existed between the United States Trustee and Petitioner Tribe due to the fact that the Trustee had initiated a program pursuant to which non-Indian owners were permitted to enter upon Tribe's reservation and to graze their livestock.[66] It was stressed by the Court of Federal Claims that, although the Trustee had no obligation to act in regard to its grazing program, having undertaken to administer the Tribe's reservation in that manner, it incurred the liability for any damages sustained. It was declared by the Court of Federal Claims that the Trustee's ". . . accedence to overstocking was less a matter of deliberate and reasoned policy as it was a consequence of careless administration."[67]

The Tribe has strenuously disagreed that the consequences should be attributed to "careless administration". It is manifest beyond question that the United States Trustee—whether by careless administration or intentional misconduct for its own benefit—has clearly violated its

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Monuments. . . . A 'monument' is a tangible landmark, and monuments as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary. . . ." *See* Tiffany, Law of Real Property, 3rd Ed., p. 430, 514; Vol. 6, Thompson Real Property, p. 576.

[66] Appendix 4, p. 26a-27a.

[67] *Ibid*, p. 31.

fiduciary obligation and is responsible for all of the damages the Tribe has experienced.[68] There the Court of Federal Claims states, with an abundance of authorities in support, that where, as here, the United States Trustee ". . . takes on or has control or supervision over tribal . . . properties, the fiduciary relationship normally exists with respect to such . . . properties . . .", citing *Seminole Nation v. United States*.[69] In *Cramer v. United States*, the Court voided a federal land patent which had granted Indian-occupied lands to a railway.[70] As reviewed above, the consequences of the "careless administration" included the finding by the Court of Federal Claims that the United States Trustee "had initiated and condoned" the overgrazing of Tribe's reservation and ". . . must be held liable for the accelerated erosion that resulted."[71]

It is important here to consider the principles enunciated by the Court respecting the Trustee's obligation to preserve and to protect Tribe's reservation—subject *res* in these proceedings. Those obligations were summarized by the Court in *Shoshone Tribe v. United States*:

> Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways. . . .[72]

The Court then added the critical principles that the power thus vested in the Trustee does not authorize or enable the United States:

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[68] *Ibid.*, p. 26a; *The Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Cl.Ct. 1980)

[69] 316 U.S. 286, 296-300 (1942).

[70] 261 U.S. 219 (1923).

[71] Appendix 4, p. 46a.

[72] 299 U.S. 476, 497 (1937).

> '. . . to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them,' [citing *United States v. Creek Nation.*][73]

The Court emphasized that for the Trustee to use Tribe's property for itself or for others, as here, " '. . . would not be an exercise of guardianship, but an act of confiscation. . . .' "[74] The rights of Indian Tribes ". . . to the occupancy of the lands . . . is 'as sacred as that of the United States to the fee,' " concluding that "Spoliation [as here] is not management."[75]

It is respectfully urged to the Court that there is positive proof of "spoliation" in the photos lodged with the Court which establish beyond controversy the environmental disaster stemming from the accelerated erosion for which the Trustee has been held liable.

There is reiterated and reapplied the concepts of *Shoshone* in the hallmark case of *Seminole Nation v. United States.*[76] The Court declared that the Trustee is obligated to fulfill its fiduciary responsibilities owning to Petitioner Tribe ". . . by the most exacting fiduciary standards." Irrespective of that governing principle of law, the Court of Federal Claims absolved the Trustee from any damages for the disaster so graphically displayed to the Court. It is worth reemphasizing that the Trustee was not required to pay any damages for the accelerated erosion pre-1946 nor for the ongoing accelerated erosion which continues to date. It is stressed in *Seminole Nation* that the Trustee is obligated to perform its responsibility with uncompro-

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[73] 295 U.S. 103, 110, (1935).

[74] *Ibid.*; *see* also *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919).

[75] *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937).

[76] 316 U.S. 285, 297, *et seq.* (1942).

mising rigidity and there must be applied the rule of undivided loyalty between the United States Trustee and Petitioner Tribe.[77]

Rather than applying those concepts of *Shoshone* and *Seminole*, the Court of Federal Claims sought ways and means to rationalize a reduction in the Trustee's obligations, not only for the disastrous consequences to Tribe's reservation antecedent to 1946 but thereafter to the present as well. For example, the Court of Federal Claims, with unchallenged proof before it that the damages continued subsequent to 1946 to the present, declared that it would "... analyze damages only for liability predicated upon Government activities occurring before August 13, 1946."[78] Under the heading of "Continuing Wrong," the Court of Federal Claims declared that Petitioner Tribe had alleged "... that erosion has continued from before 1946 into the present.[79] The unchallenged proof, as established by Petitioner Tribe, is that the damage from the erosion is even greater today than it was in 1946.[80] In seeking to overcome Tribe's challenges to the analysis of the Court of Federal Claims, it referred to the fact that Petitioner Tribe's expert, Mr. Kaczmarek, stated that:

> ... based on his examination of aerial photographs taken in 1935 and in the 1980's, by 1935 the magnitude of erosion on the reservation essentially was the same as it is today.[81]

However, the Court of Federal Claims, in total error, failed to consider the unchallenged and unrefuted proof "... that accelerated erosion has continued on the Fort

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[77] *Idid.*

[78] Appendix 4, p. 54a.

[79] *Ibid.* p. 52a.

[80] *Supra*, p. 16, *et seq.*

[81] Appendix 4, p. 52a.

Apache Indian Reservation from at least as early as 1912 to the present and is continuing to damage reservation land, water, and range resources at an unabated rate."[82]

Moreover, the Court of Federal Claims, by its findings, contradicts its own conclusions that the erosion and the disastrous consequences of it were ended 60 years ago. That Court found as a fact that the ongoing destruction of vegetative cover leaves bare spots on the surface of the soil increasing the aridity of the soil and decreasing the penetration of rain water into the soil.[83] The result of that increased aridity and the attendant depletion of soil moisture is the destruction of the natural vegetation and the replacement of it by the rampant expansion of noxious growths rendering the land useless for any purposes. Those facts are graphically displayed in the photographs deposited with the Court.[84] Another phase of the accelerated erosion—again to use the terminology of the Court of Federal Claims—is the washing away of top soil leaving the once highly productive land a barren, useless waste, also displayed in the photographs deposited with the Clerk of the Court.[85]

III. Denial of Petitioner Tribe's Right to Judicial Due Process

When Petitioner Tribe prosecuted its final appeal in Docket 22-H, it fully documented its charges that the Court of Federal Claims had not and would not grant the Tribe a hearing respecting its claims to the 16,090 acres within Tribe's reservation which are illegally occupied by the

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[82] Appendix 12, p. 99a.

[83] Appendix 4, p. 35a.

[84] Appendix 4, p. 34a; also *see* photos deposited with Clerk.

[85] Appendix 4, p. 34a.

United States Trustee.[86] There was thus presented to the Federal Circuit the specific request for an order mandating the Court of Federal Claims to hear Petitioner Tribe. The Trustee United States vigorously rejected[87] Tribe's request to be heard by the Court of Federal Claims, asserting to the Federal Circuit that the Tribe could not challenge the 1972 Compromise Settlement, alleging that the Settlement and other decisions were *res judicata* against the Tribe.[88]

There is no merit to the Trustee's assertions that the Tribe's claim to the 16,090 acres is barred by *res judicata* by reason of the action taken by the Indian Claims Commission[89] and the Compromise Settlement entered into between the Trustee and the Tribe.[90] Most assuredly both of those decisions by the Indian Claims Commission fully support Tribe's claims to the 16,090 acres which are within Tribe's reservation and were not part of the lands "outside" Tribe's reservation that were taken.[91]

The Trustee likewise cites, in support of its contentions that the Tribe is barred by *res judicata*, the cases of *White Mountain Apache Tribe v. Clark*[92] and *White Mountain Apache Tribe v. Hodel*.[93] The Trustee is fully aware that the United States was not a party to either the *Clark* or

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[86] *Choate v. Trapp*, 224 U.S. 665, 677-678 (1912); *Jones v. Meehan*, 175 U.S. 1, (1899) *see*, also *United States v. Southern Ute Tribe*, 402 U.S. 159 (1971); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

[87] Appendix 17, p. 114a.

[88] Appendix 10, *San Carlos v. United States*, 28 Ind.Cl.Comm. 399 (1972).

[89] Appendix 6, p. 75a, *San Carlos v. United States*, 21 Ind.Cl.Comm. 189 (1969).

[90] Appendix 10, p. 87a-88a, *San Carlos v. United States*, 28 Ind.Cl.Comm. 399 (1972).

[91] *Supra.*, p. 11, *et seq.*

[92] 604 F.Supp. 185, 187-189 (U.S.D.C.Ariz. 1984).

[93] 784 F.2d 921 (CA 9, 1986) *cert. den.* 479 U.S. 1006 (1986).

Hodel cases and likewise is aware that there is no predicate for asserting the defense of *res judicata* under those circumstances. Indeed there is specific precedence which declares that where the United States is not a party to the proceeding, the defense of *res judicata* has no application.[94]

It is an anomaly for the United States Trustee to assert that the Tribe was challenging the Compromise Settlement. To the contrary, Petitioner Tribe was asserting to the Court of Federal Claims that it desired to have the explicit language of the 1972 Compromise Settlement applied and effectuated for the reason that it clearly establishes that the lands located "*outside*" of the boundaries ". . . of the Reservation established by the Executive Orders of November 9, 1871 and December 14, 1872,"[95] had been taken, leaving title to the lands within the reservation, including the 16,090 acres, in Petitioner White Mountain Apache Tribe. Having been denied its right to be heard respecting its valid claims to title by the United States Court of Appeals for the Federal Circuit, Petitioner Tribe prays the Court that it grant this petition for certiorari to assure Petitioner Tribe its Constitutional right to due process.

CONCLUSION

There has been chronicled and documented above the shocking disregard by the United States Court of Appeals of Petitioner Tribe's Constitutional right to due process respecting its valid claims to the 16,090 acres located within Tribe's reservation which are illegally occupied by the United States Trustee. In denying Tribe's right to a fully and fair hearing respecting its valid claims to title,

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[94] *Land v. Dollar*, 330 U.S. 731, 736 (1947), citing *United States v. Lee*, 106 U.S. 196 (1882).

[95] Appendix 6, p. 75a; Appendix 10, p. 87a-88a.

the Federal Circuit adopted without question the gravely erroneous statements by the United States Trustee that Tribe's valid claims to title had been resolved or subsumed in other proceedings. As reviewed above, there is no merit in that grossly erroneous conclusion.[96]

Equally shocking is the affirmance by the United States Court of Appeals for the Federal Circuit of the decision of the Court of Federal Claims which denied Petitioner Tribe damages for accelerated erosion up to August, 1946 and for the accelerated erosion that is ongoing today.[97]

Petitioner Tribe's right to Constitutional Due Process so gravely violated by the courts below has been variously defined by the court as being "... based on moral principles ... fundamental to a civilized society. ... Due Process is that which comports with the deepest notions of what is fair and right and just."[98] The Court has likewise declared that due process is violated if a practice or rule "... offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[99] On that background, Petitioner Tribe prays the Court to grant this petition.

Respectfully submitted,

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Attorney for Petitioner
White Mountain Apache Tribe

Dated: January 11, 1994

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[96] *Supra*, p. 11, 13, 20, *et seq.*

[97] *Supra.*, p. 23, *et seq.*

[98] *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950).

[99] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Supreme Court, U.S.
FILED

93 1127 JAN 11 1994

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Petitioner,

v.

THE UNITED STATES,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Federal Circuit

APPENDIX

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APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-5018

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

in CASE NO(S).

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED AUG 17 1993

Francis X. Gindhart
Francis X. Gindhart, Clerk

COSTS: Against, Appellant.

PRINTING $751.49

TOTAL $751.49

ISSUED AS A MANDATE: September 20, 1993

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 93-5018

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: August 17, 1993

Before RICH, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and ARCHER, *Circuit Judge*.

PER CURIAM

DECISION

The White Mountain Apache Tribe of Arizona (Tribe) appeals from the judgment of the United States Claims Court[1] awarding the Tribe damages for some resource mismanagement and accounting claims and denying damages for others. *See White Mountain Apache Tribe v. United States*, 26 Cl. Ct. 446 (1992) (discussing accounting claims and entering judgment); *White Mountain Apache Tribe v. United States*, 25 Cl. Ct. 333 (1992) (discussing accounting claims); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614 (1992) (discussing resource mismanagement claims). We *affirm*.

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[1] The Claims Court was renamed the Court of Federal Claims on October 29, 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516.

DISCUSSION

In each of its thorough and exhaustive opinions, the Claims Court has carefully considered all of the Tribe's claims and awarded damages as to each such claim determined to be meritorious.[2]

We are convinced that the Claims Court correctly rejected each of the Tribe's remaining claims to damages and, in doing so, has properly considered, analyzed and rejected all further arguments that the Tribe has put forth in support of such claims. Further discussion and analysis by this court would be essentially repetitious of the Claims Court's extensive expositions of the facts and law. Accordingly, we affirm on the basis of the Claims Court's opinions in this case.

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[2] We note that in its statement of the facts, the Tribe asserts that the United States deprived it of 16,000 acres by an erroneous survey of the northern boundary of the Tribe's reservation. Although not specifically discussed in the Claims Court's opinions, the tribe has not presented any argument on appeal concerning this claim and the government persuasively explained that it was resolved and subsumed in other proceedings. We therefore do not consider it further.

APPENDIX 1.A.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-5018

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

Before RICH, Circuit Judge, SKELTON, Senior Circuit Judge, and ARCHER, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue September 30, 1993.

FOR THE COURT,
FRANCIS X. GINDHART,
CLERK

Dated: September 13, 1993

by Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: WILLIAM H. VEEDER
PETER A. APPEL
MICHAEL D. LIEDER

WHITE MOUNTAIN V US, 93-5018
(CLM - 22-H)

APPENDIX 2

IN THE UNITED STATES CLAIMS COURT

No. 22-H

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff,

v.

THE UNITED STATES,
Defendant

(Filed Dec. 15, 1987)

ORDER

On June 19, 1987, plaintiff filed its Motion of Plaintiff White Mountain Apache Tribe To Have Construed and Interpreted the Consent Judgment Entered September 12, 1972, Case No. 22-D as It Pertains to the Northern Boundary of Plaintiff Tribe's Reservation or Alternatively To Modify That Consent Judgment and for Authorization To File Affidavit and Related Exhibits. The motion forthwith was granted to the extent of the requested filing only. Intermittently over the last five months the parties briefed and argued the motion. The parties agreed to and the court also sanctioned the leisurely pace of briefing and argument in considering the motion. Plaintiff's last brief was filed on November 27, 1987, and the matter was addressed for the second time, although briefly, at the status conference held on December 4, 1987.

Two reasons explain the lack of urgency in concluding the filings and argument on this motion. The first is that it relates to 1972 consent judgment and defendant had

obtained a ruling before the 1986 trial of all mismanagement issues excluding this issue from trial. Second, after the opinion on the mismanagement issues entered in early 1987, the focus of the parties' and the court's energies has been to conclude this matter by addressing the issues relating to plaintiff's accounting claims.

The court carefully has considered the parties' arguments concerning plaintiff's instant motion. In connection with this motion, defendant filed a brief on November 16, 1987, captioned Defendant's Response to Supplement to Plaintiff's July 19, 1987 Motion. This brief accurately and fully addresses plaintiff's arguments. Since 1983 this court has authored over 300 pages of substantive opinions and orders concerning plaintiff's claims and defendant's contentions with respect thereto. Based on its independent review of the facts and applicable case law, it is the court's view that a judicially crafted order would not add to or differ from any of the points made in defendant's November 16 brief. Accordingly, the court adopts as the basis for its ruling the reasons set forth in defendant's brief filed on November 16, 1987. Based on the foregoing,

IT IS ORDERED, as follows:

Plaintiff's motion is denied except insofar as plaintiff has been allowed to file its affidavit and related exhibits.

/s/ Christine Cook Nettesheim
Christine Cook Nettesheim
Judge

APPENDIX 3

UNITED STATES CLAIMS COURT
WASHINGTON, D.C.

Civil Case No. 22-H

WHITE MOUNTAIN APACHE TRIBE, et. al.,
Plaintiff,

vs.

UNITED STATES,
Defendant.

AFFIDAVIT OF ELMER M. CLARK, PROFESSIONAL LAND SURVEYOR, STATING THAT THE FINDINGS OF THE INDIAN CLAIMS COMMISSION OF THE NORTHERN BOUNDARY OF THE FORT APACHE INDIAN RESERVATION IS CORRECT

I, ELMER M. CLARK, being first duly sworn, upon my oath depose and say that:

1. Based upon my intensive documentary and on the ground investigations, I state under oath that the true and correct northern boundary of the Fort Apache Indian Reservation, formerly the White Mountain Apache Indian Reservation, is described in the Executive Orders of November 9, 1871 and December 14, 1872, and that Major H.M. Robert by his January 31, 1870 letter set forth the description for the northern boundary of the proposed White Mountain Apache Indian Reservation, which description states in part:

> "Starting at that point of intersection of the boundary between New Mexico and Arizona with the south edge of the Black Mesa, and *following*

> *the southern edge of the Black Mesa to a point due north of Sombrero or Plumoso Butte. . .*"[1] (emphasis added)

Also, United States of America, Defendant's proposed Finding No. 18, states in part:

> "1873 An apache Mohave trail was followed along the south edge of *Black Mesa (Mogollon Rim).*"[29] (emphasis added)

GRAVE MISCONCEPTIONS AND ALL PERVASIVE ERRORS IN ASSOCIATE SOLICITOR, INDIAN AFFAIRS, R.F. ALLAN'S JUNE 12, 1967, MEMORANDUM OPINION SUBJECT: BOUNDARY QUESTION, FORT APACHE INDIAN RESERVATION, ARIZONA[30]

19. I have intensively reviewed Associate Solicitor, Indian Affairs, Richard F. Allan's June 12, 1967 Memorandum Opinion M-36762 regarding the, "Subject: Boundary Question, Fort Apache Indian Reservation, Arizona," and I depose and state under oath that Associate Solicitor Allan's June 12, 1967 Memorandum Opinion contains grave misconceptions and all pervasive errors when he defended the 1887 Wallace survey declaring, contrary to fact, that Surveyor Wallace followed all of his Special Instructions and that the survey *did not* contain gross errors. The 1887 Wallace survey for the northern boundary of the Fort Apache Indian Reservation on the south edge of the Black Mesa constitutes a most flagrant violation of his Special Instructions.[31] Surveyor Wallace's most flagrant violation of his Special Instructions resulted in the mislocation of the Fort Apache Indian Reservation's northern boundary by as much as three miles and, among other things, mis-

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[1] Tribe's Exhibits F 1 and F3, Appendixes A-1, A-2 and A-3.

[29] Tribe's Exhibit F 127, Appendixes E-15, E-16 and E-17.

[30] Tribe's Exhibit F 97, Appendixes B-1 through B-6.

[31] Appendixes G-1 through G-6.

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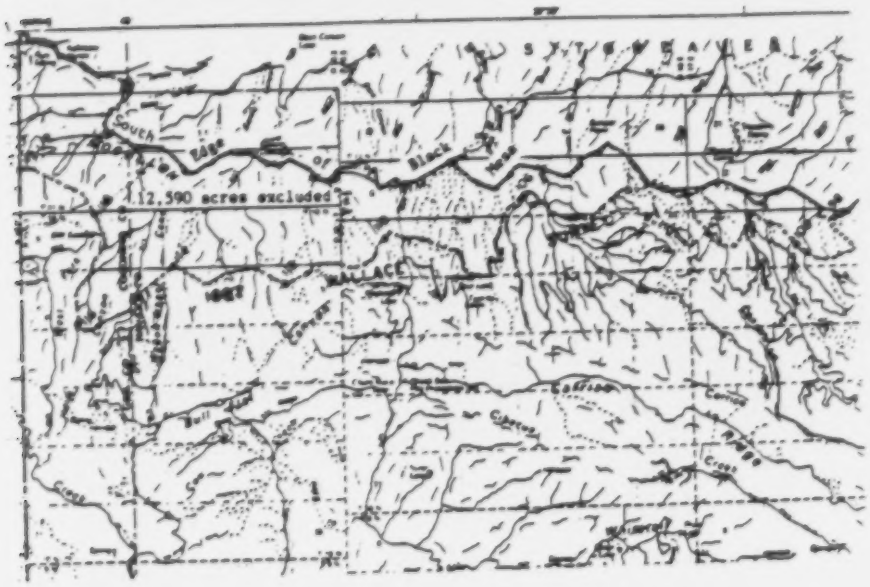
located the northwest corner for the Fort Apache Indian Reservation two miles south of the south edge of the Black Mesa thereby excluding 12,590 acres of invaluable forest and grazing lands in this one area from the reservation, all as depicted immediately below:



Surveyor Wallace's other gross errors in mislocating the south edge of Black Mesa resulted in excluding over 3,500 additional acres of invaluable forest and grazing lands.

Associate Solicitor Allan knew or should have known that the south edge of the Black Mesa or the Mogollon Rim was and is the divide between the Salt River and the Little Colorado River, all as reviewed in great detail above. In his June 12, 1967 Memorandum Opinion, Associate Solicitor Allan reviews Surveyor Wallace's field notes stating:

> "Mr. Wallace's field notes (Field Notes, Vol. 64, Arizona) indicate that he located monuments of the 1883 military survey and retraced the line which had been established four years earlier. He established the northeast corner on a ridge which

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> he described as forming the divide between the Little Colorado and Salt Rivers. 'Since this is the south edge of the Black Mesa,' he writes, 'I * * * build a monument * * *.' "[32]

Then in error, Associate Solicitor Allan misquotes Surveyor Wallace's Special Instructions and attempts to separate "the divide" from the south edge of the Black Mesa by stating:

> "It is to be noted that the instructions had referred only to the Black Mesa, not to the divide."[33]

Surveyor Wallace's Special Instructions refer to the *south or southern edge* of the Black Mesa as follows:

> ". . . . from the point of intersection of the meridian 109° 30' West longitude with the southern edge of the Black Mesa, following the trend of the said Black Mesa . . ."
>
> "Thence run North or South to the South edge of the Black Mesa . . ."
>
> "Thence run North or South to the South edge of the Black Mesa . . ."
>
> ". . . . thence run in a Westerly direction following the Southern edge of the Black Mesa, as near as practicable . . ."[34]

Likewise, Associate Solicitor Allan was unable or unwilling to recognize that the south edge of the Black Mesa, the Mogollon Rim and the divide between the Salt River

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[32] Tribe's Exhibit F 97, Appendix B-3, 1st paragraph.

[33] Ibid.

[34] Tribe's Exhibit F 69B, Appendixes F-1 through F-4.

and the Little Colorado River are one and the same, all as reviewed in detail above, and he states, in part:[35]

> "The surveyor was under no obligation to follow the divide as such. He was instructed to follow the south edge of the mesa . . ."[36]

Associate Solicitor Allan again attempts to confuse the facts and does not recognize that any reference to the south edge of the Black Mesa or Mogollon Rim necessarily refers to the divide between the Salt River and the Little Colorado River and states in part:

> "In 1939, in response to a question raised about the accuracy of the boundary, the Associate Commissioner of Indian Affairs concluded that the northern boundary line 'is rather indefinite and would be difficult to locate on the ground and unless there is definite evidence that the southern edge of the Black Mesa is farther north than where the present line is surveyed, this Office feels it would be well to accept the line as it stands.' He also pointed out that the boundary description and instructions refer to the Black Mesa, but not to the watershed (divide) as the natural boundary. (BIA File 10771-1927-304.2, National Archives, letter, December 19, 1939)."[37]

Associate Solicitor Allan, in error, accepts an apparently unsupported statement, contrary to the well established fact, that the south edge of the Black Mesa or the Mogollon Rim is the divide between the Salt River and the Little Colorado River, all as reviewed in great detail above.[38]

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[35] Tribe's Exhibit F 127, Appendixes E-16 and E-17.

[36] Tribe's Exhibit F 97, Appendix B-5, 4th paragraph.

[37] Tribe's Exhibit F 97, Appendix B-5, 3rd paragraph.

[38] Appendixes E-1 through E-20.

Associate Solicitor Allan, also in error, accepts the unsupported statement that the, "northern boundary line is rather indefinite and would be difficult to locate on the ground," when, in fact, Surveyors Wallace's, Wright's and Blout's field notes all confirm that each of those surveyors recognized that the south edge of the Black Mesa, or the Mogollon Rim was the divide between the Salt River and the Little Colorado River and their surveys *generally* followed that divide which can be precisely located.

Associate Solicitor Allan is again in error while defending Surveyor Wallace's 1887 survey when he states in part:

> "In view of this fact, upon which I have previously commented, I cannot concur with Mr. Dr Rose's conclusion that 'it was the intent that the entire north boundary of the Fort Apache Indian Reservation be accurately placed on the hydrologic divide between the Little Colorado and the Salt River Drainages.' The surveyor was under no obligation to follow the divide as such."[39]

As reviewed in detail above and as supported by the facts, the south edge of Black Mesa, the Mogollon Rim and the divide between the Salt River and Little Colorado River are one and the same, therefore, it was the intent that the entire north boundary of the Fort Apache Indian Reservation be located on the divide; and

20. Associate Solicitor Allan's Memorandum Opinion then states in part:

> "The south edge of the mesa would certainly not coincide with the crown of the mesa. It would necessarily be a line to the south of the highest elevation on the mesa."[40]

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[39] Tribe's Exhibit F 97, Appendix B-5, 4th paragraph.

[40] Ibid.

I state under oath that the south edge of Black Mesa, based upon my personal knowledge, was and is the divide between the Salt River and the Little Colorado River or as Associate Solicitor Allan refers to it the "crown of the mesa." It is a bazar fabrication for Associate Solicitor Allan to support a line as much as three miles south of the south edge of Black Mesa, described by Surveyor Wallace's and Surveyor Wright's field notes as almost impassable, mountainous, heavily timbered, covered with dense underbrush and exceptionally difficult to survey in preference to the very accessible south edge of Black Mesa.

Associate Solicitor Allan continues to defend the 1887 Wallace survey and attempts to confuse the fact that the south edge of the Black Mesa, or the Mogollon Rim, is and has always been the divide between the Salt River and the Little Colorado River along the northern boundary of the Fort Apache Indian Reservation.

These statements attempt to gloss over Surveyor Wallace's gross error when he violated his Special Instructions to follow the south edge of the Black Mesa and he left the "Rim" and the "divide" near mile 97.5 and located the northern boundary by as much as three miles south of the south edge of Black Mesa, all as reviewed in detail below.

* * * * *

White Mountain Apache Tribe and Defendant, The United States of America.

49. I state under oath that on the afternoons of December 8 and December 10, 1986, I had meetings with Mr. I.S. Weissbrodt, Attorney, Of Counsel, for the White Mountain Apache Tribe, Plaintiff before the *Indian Claims Commission Docket No. 22-D.* During these meetings I advised Mr. Weissbrodt of my ongoing research of the Indian Claims Commission Docket No. 22-D records for the White

Mountain Apache Tribe and reviewed some of the available records in Mr. I.S. Weissbrodt's office.

At the December 10th meeting with Mr. I.S. Weissbrodt we reviewed the history of the White Mountain Apache Tribe's northern boundary problem and Associate Solicitor Allan's June 12, 1967 Memorandum Opinion. At that time Mr. Weissbrodt stated that subsequent to Associate Solicitor Allan's working in the Solicitor's office, Department of the Interior, Mr. Allan had come to work for their firm, Weissbrodt and Weissbrodt, Washington, D.C. He also stated that Mr. Allan had not worked on the *Indian Claims Commission Docket No. 22-D* for the White Mountain Apache Tribe.

50. I state under oath that I am the same Elmer M. Clark that prepared and forwarded the exhibits to the *U.S. Court of Claims, Docket No. 22-H* On Behalf of the White Mountain Apache Tribe, Whiteriver, Arizona. Attached herewith marked Appendix H is the list of exhibits submitted to the U.S. Court of Claims Docket No. 22-H and all of the exhibits referred to in his affidavit.

/s/ Elmer M. Clark
ELMER M. CLARK
PROFESSIONAL LAND SURVEYOR

STATE OF COLORADO)
) ss
COUNTY OF ARAPAHOE)

Subscribed and sworn to before me this 3rd day of March, 1987.

/s/ Betsy Goodman
Notary Public

My Commission expires:

My Commission Expires Apr. 22, 1989
5135 DTC Parkway
Inglewood, CO 80111

APPENDIX 4

UNITED STATES CLAIMS COURT.

No. 22-H.

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff,

v.

The UNITED STATES,
Defendant.

Feb. 6, 1987.

Indian tribe brought action against Government under Indian Claims Commission Act, alleging breaches of Government's fiduciary duties in managing tribe's water rights, rangeland, and forest resources. The Claims Court, Nettesheim, J., held that: (1) Government did not engage in mismanagement of tribe's water resources neither before or after jurisdictional cutoff date under Act; (2) Government mismanaged tribe's rangeland during period prior to jurisdictional deadline but did not engage in continuing wrong nor was it guilty of fraudulent mismanagement; and (3) Government mismanaged tribe's timber resources on "United One" area on which timber was sold to non-Indians, but did not engage in fraudulent mismanagement or continuing wrong after deadline.

Ordered accordingly.

William H. Veeder, Washington, D.C., for plaintiff; Robert C. Brauchli, Whiteriver, Ariz., of counsel.

Bernard M. Sisson, Washington, D.C., with whom were Harry H. Kelso and Asst. Atty. Gen. F. Henry Habicht II, for defendant.

OPINION

NETTESHEIM, Judge.

INTRODUCTION

Docket 22 began as a first amended petition filed in the Indian Claims Commission on October 18, 1950, by the White Mountain Apache Tribe of Arizona ("plaintiff") and another tribe that departed the litigation on January 19, 1981, after settlement of its claims. Suit was authorized by the Indian Claims Commission Act of August 13, 1946, Pub.L. No. 79- 726, § 2, 60 Stat. 1049, 1050, as amended, 25 U.S.C. § 70a (1976) (omitted from Code pursuant to Commission termination on Sept. 30, 1978). On May 25, 1959, the Commission severed Docket 22 into a number of cases. A second amended petition was filed on October 27, 1959, as Docket 22-H asserting claims for mismanagement of tribal resources and for a general accounting. Plaintiff's aboriginal land claims were adjudicated as Docket 22- D in 1969. San Carlos Apache Tribe v. United States, 21 Ind.Cl.Comm. 189 (1969). Docket 22-H was transferred to the United States Court of Claims on December 15, 1976, pursuant to the Act of October 8, 1976, Pub.L. No. 94-465, 90 Stat. 1990, 25 U.S.C. § 70v (1976) (omitted from Code pursuant to Commission termination on Sept. 30, 1978), and then continued in the successor United States Claims Court. This opinion addresses all of plaintiff's claims in Docket 22-H for mismanagement of the water, rangeland, and timber on the Fort Apache Indian Reservation (the "reservation"). Plaintiff's claims for general and special accountings are proceeding separately.

The resource mismanagement claims were tried in September and October 1986, following a three-day site in-

spection on the reservation in early September. Since these claims were tried 27 years after the second amended petition was filed, and since the trial addressed many issues (all but a few lending themselves to explication by explication by expert witnesses), identifying with some precision what the trial was about is important.

Over the years that this matter has been before the Indian Claims Commission, the Court of Claims, and this court, the parties have leveled charges of delay in adjudicating plaintiff's claims. In previous decades defendant may have been dilatory, as plaintiff charges, but during the four-year period that this court has presided over the case, the Government has met every court- imposed deadline. Whether or not plaintiff delayed trial, nevertheless, has no bearing on the merits of plaintiff's claims that are considered in this opinion.

Although the evidence adduced at trial described the relationship between plaintiff and the Bureau of Indian Affairs (the "BIA") or the Department of Interior, the wisdom *vel non* of the BIA's (and its predecessor entities') providing employment for many of plaintiff's members, managing the reservation's timber resources, and acting as the bureaucracy that controls much of

* * * * *

> "When it is remembered these Indians were placed on this reservation with absolutely nothing—the most hated of all the western Indians, kept strictly within the limits of their reservation, with no market but the army post, and what they now have is the result of their own labor, and considering the obstacles they had to overcome in this mountainous country—little as it seems, they have done exceedingly well."

If the mountains and forests are the most striking physical features of the reservation, plaintiff would regard as its paramount resource the Salt River. "Practically the

entire Reservation drains to the Salt River . . . , " observed the June 1, 1944 "Post-War Program" for the reservation.[2] Prior to 1872 when they were placed on the White Mountain Apache Indian Reservation, the Indians comprising plaintiff tribe had been nomads, with a history of agriculture, growing corn, wheat, beans, and vegetables, which they continued growing on the reservation by irrigating with diversion dams and ditches small areas of benchland along the streams. Plaintiff had an established history of agriculture. The Indian Claims Commission found that the tribes comprising the Western Apache, which included other nearby tribes, satisfied an estimated 25 percent of their diet by the crops they grew. *San Carlos Apache Tribe v. United States,* 21 Ind.Cl.Comm. at 208. Because the reservation was a long distance from commercial centers, the markets for plaintiff's produce after the reservation was established were limited.[3] As the game that plaintiff hunted became scarce, government rationing became important to plaintiff's survival, and, as will be discussed, the Indian agents on the reservation looked toward development of other resources for producing income for the tribe.

DISCUSSION

I. *Claims for mismanagement of plaintiff's water resources*

According to Dr. Charles E. Brockway, defendant's expert hydrologist and engineering economist, a watershed is defined as the topographic area from which water on

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[2] The remainder of the quoted sentence reads: "and it is therefore an important source of water supply for the Roosevelt Reservoir and Salt River Valley. . . . " This subject is explored fully in part I of this opinion.

[3] The Annual Reports were prepared yearly by the United States Indian Agents or Superintendents of the BIA's predecessor entities on the reservation. Before 1920 only the Annual Report for 1917 describes the markets for agricultural produce as other than limited.

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the surface flows towards a central stream. The watershed of the Salt River encompasses principally the Verde, White, and Black Rivers. The Verde River itself is not on the reservation.

The Black River forms the southeastern boundary of the reservation from the far east and joins the White River which flows from the northeast through the reservation to form the Salt River, which is the southern border of the reservation. From that point the Salt River flows west. Tributaries to the Salt River are creeks within the reservation, including the Cedar, Carrizo, Cibecue, and Canyon Creeks.

Southwest of the reservation a series of structures regulates and stores the flows of the Salt and Verde Rivers. Downstream of the reservation on the Salt River are the Roosevelt Dam and Reservoir; Horse Mesa Dam and Apache Lake; Mormon Flat Dam and Canyon Lake; and Stewart Mountain Dam and Saquaro Lake. These struc-

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tures were constructed from 1905 to 1930 as the Salt River Federal Reclamation Project and utilize all the natural and surplus flow of the Salt River coming off the reservation that has not been appropriated and used upstream. The Verde River runs through the Bartlett and Horseshoe Dams and their corresponding reservoirs.

Roosevelt Dam, the earliest of these structures, is the primary storage facility for the Salt River Federal Reclamation Project. After passing through the dams with their corresponding power plants and lakes, the Salt River meets the Verde River above the Granite Reef Diversion Dam, also part of the Salt River Federal Reclamation Project. Irrigation canals sprout on either side of the Granite Relief Diversion Dam. South of Phoenix the Salt River joins the Gila River, which runs west into the Colorado River system. In addition to the Salt River Federal Reclamation Project, the Central Arizona Project brings water from the Colorado River into the greater Phoenix area above the Granite Reef Diversion Dam.

The combined storage capacity of the Roosevelt, Horse Mesa, Mormon Flat, and Stewart Mountain Dams, is 1,755,000 acre feet. The Verde River generates total storage capacity in the Horseshoe and Bartlett Dams of 317,700 acre feet. The contribution of the Salt River to the water

* * * * *

fore found and concluded that plaintiff proved no damages.

2. The claim for damages based on the cost of constructing irrigation facilities to irrigate what plaintiff views as practicably irrigable acreage based on present-day technology has been rejected. Evidence was lacking that plaintiff was prevented from irrigating any acreage or that plaintiff had financial resources to irrigate any additional acreage. Even if plaintiff had proved a continuing wrong, no legal basis for the type of damages sought by plaintiff

exists. This is because the measure of damages is the diminished value of the acreage that plaintiff could have irrigated but for the Government's wrongful acts. No court had recognized damages in an action filed under the Indian Claims Commission Act premised on the cost of constructing irrigation facilities (absent a treaty, statute, or agreement obligating their construction) or on the value of water to a user who benefited by its diversion.[12]

II. *Claims for mismanagement of plaintiff's rangeland*

The Fort Apache Indian Reservation contains 1,664,289 acres of land potentially suitable for the grazing of livestock—virtually the entire reservation. This acreage spans a variety of terrains and altitudes, from the Sonoran desert zone, below 4,000 feet elevation, to the Spruce-Alpine fir zone, above 8,500 feet. Early correspondence and reports described the abundance of grass and other forage found on the reservation and compared the range resources quite favorably with grazing land in surrounding areas. For example, the BIA Indian Agent's 1881 Annual Report described the northwestern portion of the reservation as valleys with *"excellent grass for grazing purposes. . . . "* Similarly, a 1901 agricultural lecturer recalled the original condition of the Salt and Verde watersheds: "In the swales and valleys of this country, and wherever water was more abundant, the great bunch grasses grew luxuriantly . . . , affording an abundance of native hay in the dry season and quickly freshening up into green forage after a rain. . . . " Indian harvests and sales of as much as 1,500,000 pounds of native hay (in 1900) to the military post confirm the early productivity of plaintiff's rangeland.

Well before any substantial livestock grazing began on the reservation, the American Southwest, and Arizona in

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[12] The court ruled prior to trial that if a decision that plaintiff had failed to show some evidence of a continuing wrong were not upheld, the record will be reopened for defendant to complete its case on continuing wrong. *See supra* note 1.

particular, became the locus of a rapidly developing range livestock industry. Overstocked herds in western Texas swelled into the Arizona territory beginning in 1876. By 1885 Governor F.A. Tritle likened Arizona to "one vast grazing field" and a "stockraisers' paradise." Livestock numbers increased rapidly until by 1889 the governor's annual report noted that "the entire grazing area is nearly if not fully occupied where water can be obtained." Over the next few years, the combination of drought and overstocking took its toil on the condition of the ranges:

> [T]he grass supply soon diminished throughout the territory to such an extent that it was impossible to mature prime beef any longer on the open ranges, and the cattle owners were forced. . . . to sell their steers as feeders at greatly reduced prices to buyers from California, Montana, and Kansas.

Report of Governor of Arizona, 1893. Selling part of their herds at great financial loss was one option for stockmen to reduce grazing pressure on the land. Another option was to try to use the relatively ungrazed lands of the White Mountain Apache Indian Reservation, which in 1892 included the present-day Fort Apache Indian Reservation.

The history of non-Indian grazing on reservation rangeland began with individual incidents of trespass and ended with a government-sponsored system of grazing permits under which the bulk of the reservation was leased to non-Indian stockmen. It is unclear when illegal trespass to graze sheep and cattle on the reservation began; however, the first incident appearing in the records occurred in 1891. To avert its cattle's removal from the San Carlos reservation by BIA agents, the Chiracahua Cattle Company requested that their trespassing cattle be allowed to remain through the winter of 1891-1892 and then later offered to pay a nominal amount for that privilege. Despite being informed by an Assistant Attorney General that no statutory authority existed for the lease of reservation

lands under grazing permits, the Commissioner of Indian Affairs directed Acting Agent Captain Louis Johnson to allow the cattle company to leave its stock on the reservation through the winter and to collect a grazing tax from the owners. The record reflects an almost continuous presence thereafter on the reservation of non-Indian cattle. This was due primarily to the inability of the Army troops to patrol adequately the entire reservation and their failure to remove permanently livestock discovered there. Difficulties in collecting the grazing taxes were also noted.

As recounted earlier in this opinion, the White Mountain Indian Reservation was split in 1897 into the San Carlos and Fort Apache Indian Reservations. Although the vast majority of the trespassing cattle had been on the San Carlos portion prior to the separation, by 1898-1899 the number of reported non-Indian cattle on the Fort Apache Indian Reservation exceeded 1,000. The actual number of trespassing livestock is unknown, as their owners were not inclined to acknowledge their trespassing, whether accidental or intentional, and even less inclined to pay a grazing tax. On December 9, 1901, Secretary of the Interior E. A. Hitchcock approved the start of a livestock permit system on the Fort Apache Indian Reservation. No indications appear in the record that, as of that date, any observable overgrazing or erosion had been caused by livestock-raising activities on the reservation.

The establishment of a grazing permit system was a response to trespassing cattle. Central to its establishment, however, was the desire of the Indian Agents to develop income for plaintiff. The early Annual Reports are replete with comments concerning the need and prospects for achieving productivity from the reservation and for devising plans for enhancing the Indians' and tribe's income.

Plaintiff makes several claims regarding the Government's management of the rangeland on the reservation. Plaintiff's primary claim is that the Government allowed

non-Indian permittee stockmen to overgraze their livestock on the reservation, thereby causing widespread erosion and deterioration of the land and encroachment of juniper and pinyon pine trees on the ranges. Plaintiff also contends that the Government carried out its grazing policy for the purpose of increasing the flow of water from the reservation for the benefit of downstream users. Finally, plaintiff claims that the Government's efforts to eradicate and control the growth of juniper and pinyon pine trees on the reservation were also intended to produce water for downstream users.

A. *Liability* (pre-1946)

1. Before reciting the history of permit grazing system, it is useful to define terms used by the parties' experts to evaluate range conditions on the reservation and to discuss generally plaintiff's theory. Plaintiff introduced its evidence regarding erosion primarily through the testimony of four expert witnesses: Dr. Joe C. Elliott, expert in botany and range management; Michael B.Kaczmarek, expert in geology, soil science, and ground water hydrology; Mr. Watson; and John E. Wicks, expert in appraisal and agricultural economy. "Range management" was a recognized science since at least the 1930's that sought to manage land for maximum livestock production consistent with its conservation. Since the 1940's the science has evolved into the management of rangeland resources for optimizing multiple land uses consistent with conservation of the land. The quantity of livestock that can be grazed on a particular piece of land on a sustained basis without diminishing the ability of the land to support that amount of livestock is expressed as the "carrying capacity" of that land.[13] Carrying capacity is not a static concept and may

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[13] More precisely, Dr. Elliott does not disagree with the definition of carrying capacity formulated in a text co- authored by defendant's expert Dr. Thadis W. Box: " 'the maximum animal numbers which can graze each year on a given area of range, for a specific number of

be increased or decreased over time by changes in such factors as rainfall; species composition of vegetation; and grazing pressure, among others. Carrying capacity is measured in "animal units" ("AU's"), with one AU being the number of animals per year that would be equivalent in grazing requirements to a 1,000-pound cow.

Furthermore, the concept of "overstocking" must be distinguished from "overgrazing." Grazing a number of livestock on a range in excess of the range's carrying capacity constitutes overstocking. Although the long-term sustained yield of the land is exceeded, overstocking does not cause plant succession. Overgrazing is the result of livestock's eating and trampling the vegetation cover of the range to such an extent as to reduce the carrying capacity of the range. Overstocking and overgrazing can occur independently of each other.

A "range site" is an area of land in pristine condition that will produce a predictable amount of vegetation; and a "climax site," a range site in pristine condition, reflects a harmony between land and plants. "Primary succession" refers to the development of soil and plants to a climax community. After man has disturbed the land and altered the plant life, the plant life reflects "secondary succession." "Deviation from climax" is a method to determine "range condition" and was utilized by Dr. Elliott.

Finally, the term "accelerated erosion" refers to a land use practice and comprehends the effects of man's activ-

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days, without inducting a downward trend in forage production, forage quality, or soil.' " Affidavit of Joe C. Elliott, dated June 26, 1986. ¶ 22 (quoting L. Stoddard, A. Smith & T. Box, *Range Management* 183 (3d ed. 1975)). Out of an abundance of caution, the court has considered rebuttal affidavits submitted by plaintiff before trial that speak to defendant's expert reports, even if plaintiff did not draw from its witnesses testimony on point. The court is of the view that the affidavits, only to the extent discussed in this opinion, make points crucial to an understanding of plaintiff's expert testimony.

ities. "Natural" or "geologic" erosion does not reflect the influence or activities of man on the land.

Plaintiff's theory is that by issuing grazing permits and failing to prevent illegal trespass grazing, the Government allowed the range to be both overstocked and overgrazed, resulting in a permanent reduction of the carrying capacity of the rangeland and erosional damage to the land. Defendant offered evidence to show that any overstocking that occurred did not result in overgrazed conditions on the rangeland; that the Indians themselves overgrazed the range with their own cattle and horses; that any erosion detected on the reservation was the product of natural climatic forces, rather than overgrazing; and that observable erosion is far less severe than suggested by plaintiff.

2. During the time period relevant to plaintiff's grazing claims, the duties that the Government owed the tribe regarding the reservation's rangeland derived from the fiduciary relationship existing between the parties. The nature of this relationship was elaborated in *Navajo Tribe of Indians v. United States*, 224 Ct.Cl. at 183, 624 F.2d at 987, and given further confirmation in *Mitchell v. United States*, 463 U.S. at 225, 103 S.Ct. at 2972.

> In particular, where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Navajo Tribe of Indians, 224 Ct.Cl. at 183, 624 F.2d at 987 (citations omitted). In the case at bar, the Government established a program of leasing grazing land under permits to non-Indian livestock owners. It was under no obligation to do so. But having undertaken to administer this program, the Government was obligated to act in a fi-

duciary capacity toward those lands. Although the rules governing the relationship between private fiduciaries and their beneficiaries do not apply necessarily with full vigor to the Government-Indian fiduciary relationship, it is entirely appropriate to utilize the general law of fiduciary relationships. *Navajo Tribe of Indians*, 224 Ct.Cl. at 185, 624 F.2d at 988. Here, the Government was obligated to supervise the issuance of permits and observe the condition of the range to ensure that the permittee livestock levels and grazing activities did not cause the range to become overgrazed or increase its susceptibility to erosive forces. Consequently, the Government will be liable for any breaches of that duty proved by plaintiff. In contrast, liability cannot attach for the Government's failure to provide funds for fencing the range to protect the reservation itself from trespass or to protect the range within the reservation grazed by Indian cattle from encroachment by permittee cattle. The Government provided some funding for fencing and repairs, but it was not obligated by virtue of that effort to finance the completion or maintenance of fencing. *See, e.g., Navajo Tribe v. United States*, 9 Cl.Ct. at 416; *Navajo Tribe v. United States*, 222 Ct.Cl. 158, 163-64, 610 F.2d 766 (1979).

It is apparent from the record that an associative, if not causative, relation between overstocking and overgrazed and eroded conditions was observed on rangelands in Arizona surrounding Fort Apache and on the San Carlos Indian Reservations prior to the initiation of the grazing permit system on Fort Apache. Moreover, at the time the Government understood this relationship. BIA Indian Agent C. W. Crouse wrote to the Commissioner of Indian Affairs in 1902 listing reasons why the reservation should not be overstocked:

> Some parts of the San Carlos reservation has been overstocked and it is almost ruined; this reserve, although adjoining the San Carlos is better suited for stock raising; it has more water and it is more moun-

> tainous; but it would in a very few years be in the same condition as some parts of our adjoining Indian land if allowed to be overstocked; it would be worthless to the Indian land if allowed to be overstocked; it would be worthless to the Indian when he shall have had a herd or flock for himself.

A 1910 University of Arizona Agriculture bulletin by J. J. Thornber recounted the transition from luxuriantly-covered grazing ranges in the 1800's to overgrazed, eroded, gullied surfaces by 1908:

> Under our arid conditions, this overstocking soon resulted in destructive overgrazing and tramping out of large areas of forage producing plants, often beyond recovery. With this completed, the herds were moved on to other less grazed districts to be denuded, in turn, of their plant growth. Naturally, such depletion of the plant covering was very much hastened and intensified by recurring droughty seasons or years, which matter became all the more serious with the gradual increase in stock over the country. After eating off closely and trampling out the plant covering in the neighborhood of watering places, the hungry animals were compelled to travel over farther for grass, eventually wearing deep trails or paths across their feeding grounds, usually in the beds of draws, gulches, and other water courses. Later, not a few of these paths became cut down or eroded by storm water into deep gullies and washes.
>
> . . . .
>
> Thus, step by step, the ranges came to be stocked to their full carrying capacity, and finally, in the absence of any grazing regulations, overstocked. As a result of this, destructive overgrazing and tramping followed, which with recurring droughty spells, often of great severity, destroyed much of the grassy covering, leaving the bared, tramped, and cut-up surfaces

> in prime condition for erosion and gullying, which was the final chapter in the breakdown of the ranges.

Similarly, a 1904 United States Geological Survey paper on the Black Mesa Forest Reserve, adjacent to the reservation, described grazing conditions on a portion of the reserve, as follows:

> The Verde slope in the Beaver Creek watershed is an example of repeated overstocking. This district was formerly a source of great wealth to settlers and stockmen in that vicinity, but the excessive number of cattle and horses has finally resulted in the complete annihilation of the pasture.

The author proposed careful adherence to proper stocking levels: "Unless stringent rules are adopted, regulating the number of stock and the areas on which they shall be grazed on each permit, this condition will sooner or later obtain throughout the reserve." Indeed, defendant's expert witness in range management, Dr. Thadis W. Box—one of the leading range scientists whose chronological narrative and document collection on management of plaintiff's range provided an overall understanding of what occurred on the range—admitted that the consequences of overgrazing were well known by the turn of the century. Absent, according to Dr. Box, was knowledge of the carrying capacities and, hence, the proper stocking rates for ranges.

3. When the first grazing permits were issued on the reservation, the rangeland was, by all accounts, in good condition. Expert witnesses for both parties offered documents and their own calculations of the total carrying capacity of the entire reservation at that time. For plaintiff Dr. Elliott estimated the carrying capacity at 40,874 AU's in original excellent condition. For defendant Dr. Box testified that 31,000 AU's represented a very rough estimate of the long-term carrying capacity. Dr. Box considered the initial carrying capacity impossible to calculate with any

precision and irrelevant anyway, since, he stated, any level of stocking changes plant composition and productivity such that the initial carrying capacity eventually stabilizes within a lower broad range of long-term carrying capacity.

Whether one accepts the initial carrying capacity or the long- term carrying capacity as the preferred concept for this inquiry, neither necessarily is determinative of the Government's duty not to allow overstocking and consequent overgrazing of the range. If it was difficult or impossible to determine the precise carrying capacity during the early Twentieth Century, the Government could have employed an approximate figure.[14] When even an approximation would have been wholly speculative, the Government was obligated, nevertheless, to reduce stocking levels on the reservation once it became apparent that existing stocking levels were causing the rangeland to become overgrazed and subject to erosion. If observable damage was being done to the range, the Government cannot avoid its duty by attempting to rely on its alleged inability to calculate carrying capacity with mathematical certainty. The duty of the Government to operate the grazing permit system in order to avoid overgrazing on the reservation was not satisfied solely by the Government's contention that it adhered generally to accepted carrying capacities at the relevant times in setting stocking levels. If overgrazed and eroded conditions were the result of following the accepted knowledge on stocking levels, it should have been apparent to the Government that the accepted carrying capacities were unreliable.

Moreover, despite the fact that four major range surveys were made on the reservation between 1912 and 1948,

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[14] In 1934 the Secretary of the Interior became obligated "to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate other such rules and regulations as may be necessary . . . to prevent soil erosion." 25 U.S.C. § 466 (1982).

yielding estimated carrying capacities of between 31,000 and 44,000 AU's, defendant admits that the actual stocking rate always exceeded the estimated carrying capacities for the years 1912-1946. This effect was further concentrated by the fact that permittee ranges encompassed less than the entire grazing land of the reservation, which was the basis for the carrying capacity estimates.

Dr. Box stated that overstocking of the range with permittee livestock, at the expense of the long-term condition of the land, can be justified by plaintiff's need for revenue from the permits at the time. He argued that overutilization of plaintiff's range resources to generate present income could have been more important than a more modest use of the range that would have protected the renewable characteristic of the resource but yielded less short-term income. However beneficent Dr. Box's explanation may appear, it was not the Government's operative management principle at the time. BIA Livestock Supervisor Charles B. Metcalfe's 1915 Report to the Commissioner of Indian Affairs explains his range management philosophy:

> No range should ever have a large enough number of stock on it to endanger the permanency of the grasses, brush and other stock food products, as it is better to have a smaller continuous income than to graze an excessive number and damage the ranges thereby.

From such evidence it appears that the Government's accedence to overstocking was less a matter of deliberate and reasoned policy as it was a consequence of careless administration.

Dr. Box postulated that plant succession provides evidence of whether the range was damaged by overgrazing. Although he undertook no quantitative soil or vegetation tests, his on-site inspection confirmed that plant succession on the range did not exhibit changes in the last 40 years

other than those a range manager would expect in range that had evolved from a pristine condition to what he described as a healthy range condition exhibiting secondary succession. This opinion was tied to Dr. Box's examination of several exclosures (fenced-off areas excluding cattle and horses) on the reservation, one of which was 40 years old. Because the exclosure and surrounding range exhibited little variation in plant composition, Dr. Box concluded that there had been no degradation to the range. Dr. Elliott offered the equally plausible opinion that the degradation was so severe that the exclosed range had not improved in the 40-year period. Based on the court's observation of the exclosures and adjacent open rangeland, the opinions on what plant succession reveals cancel each other out. It is found, based in part on the court's own observations, that present-day vegetation is consistent with overgrazed conditions—at least to some extent. The undisputed recorded historical evidence supports a finding that the rangeland was overgrazed.

4. The livestock permit system on the reservation lasted from 1902 until 1953. The record reveals that the number of permittee livestock increased from approximately 6,000 AU's in 1902 to a peak of 55,000 in 1920, then decreased until the permit program ended in 1953. These figures represent only the official reported permittee totals. Plaintiff presented ample proof that permit holders frequently underreported the number of livestock that they actually grazed on the reservation—some permittees by as much as 50 percent. This is not surprising, since evidence was presented that there were several years (some consecutive) in which no counts were made of the actual numbers of permittee livestock. Despite Indian opposition to the granting of permits to outside stockmen, the program went ahead. The rationale for leasing grazing land to non-Indians was twofold: 1) Collecting grazing fees was preferable in the BIA's eyes to continuing their futile efforts to remove trespassing livestock from the range; and 2)

Indian Agent Crouse viewed grazing fees as a useful source of funds with which to purchase livestock to build Indian herds.[15]

Agent Crouse's intention to help the Indians establish a successful livestock industry and thereby gain economic self- sufficiency was admirable. The grazing fees did provide thousands of dollars in revenue that enabled Agent Crouse to purchase livestock, primarily cattle, for the tribe. However, the permit system failed to curb trespass by outside cattlemen. More importantly, it coincided within a few years with the first reports of overgrazed areas on the reservation in the headwaters of Canyon Creek (1906) and Carrizo Creek (1910), both in the northwestern portion of the reservation. Reports from successive years documented the spread of overgrazed conditions from the western sections of the reservation to the northern and northeastern sections near McNary. The reports also contained numerous recommendations both that accurate counts be made of the number of permittee livestock and that livestock numbers be reduced on ranges that were noticeably overgrazed. Later reports described the continued deterioration of the Carrizo range—"a serious state of depletion" (1932)—and the "seriously overgrazed" condition (1937) of the lower elevations in the southern portion of the reservation.

Reports of accelerated erosion do not appear in the record until 1922 when an inspector wrote that the land in the valleys along Cibecue Creek and East Fork "is eroding rapidly." Inspector John W. Atwater's observation of rapid erosion indicates that the processes responsible for the erosion began earlier than 1922, although it is unclear just how much earlier. Three years later Forest Examiner E. M. Pryse commented that "most of the Fort Apache Re-

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[15] Agent Crouse had begun to fund an increase in Indian herds in 1901 with savings achieved by reducing the Indians' beef rations by 25 percent.

servation has been badly overgrazed. . . . " He also noted what he observed to be the result of this overgrazing: "Irreparable damage has been done, especially in the way of erosion." Perhaps the most vivid description came from Superintendent Charles L. Davis in a 1927 letter to Arizona Senator Carl Hayden:

> Where the ranges are grazed to the live stock capacity which the permittees would think right and proper the vegetation is so reduced on the land *that the storm waters come down off the mountains in such torrents that it destroys the agricultural lands along the stream beds* to an extent which no one can appreciate except by close personnel observation and a knowledge of what conditions were 10 to 15 years ago. Every little rainy spell now produces torrents from the mountains equivalent to the heaviest storms before the surface vegetation was so completely destroyed. This has resulted in *such terrible erosion that it has washed away at least 50 percent of the lands formerly cultivated by the Apache Indians* 10 to 15 years ago. *Each of the remaining 50 percent has been left so high and dry* and in such minor areas *that water cannot be put on it* at a cost which will justify reclaiming it. *The agricultural products of the Indians have been reduced far over 50 percent through this cause since I have been here. It is a loss that no one can well appreciate until he sees it.*

Plaintiff presented both historic and contemporary photographs depicting eroded land forms on the ranges. Furthermore, the court had the opportunity to view for itself many eroded areas during its on-site inspection of the reservation.

Although the Government does not dispute that erosion has, and is, occurring on the reservation, it attributes the cause to wholly natural climatic forces operative throughout the Southwest generally. Plaintiff contends that all

erosion is accelerated erosion caused by overgrazing of permittee and trespassing cattle on the reservation.

5. Overgrazing apparently causes the available forage to be diminished, especially as less palatable plant species replace existing species, but it is not certain whether this phenomenon is temporary (and if so, for how long), or whether the change is of such lasting effect as to be considered permanent. Somewhat intertwined with the change in vegetation cover, however, is the far more substantial claim by plaintiff that *overgrazing changed the vegetative cover and topography of the rangeland to such an extent that topsoil washed away, permanently eroding the landscape of the range and gouging the streambeds to levels below many of the existing irrigation channels.*

It is unquestioned that substantial erosion has occurred on the rangeland and along the streambeds. The parties presented differing explanations of its causes. Plaintiff argued that overgrazing was the primary cause and that without overgrazing erosion would not have occurred on the reservation. Defendant conceded that erosion may be caused by any of three factors: climatic forces, internal adjustments of the terrain, and overgrazing. However, defendant contended that overgrazing was not an operative factor in any erosion that occurred on the reservation. Although the court agrees with defendant that overgrazing was not the sole cause of erosion, documents and analysis presented by Mr. Kaczmarek construct *a credible explanation of how continued overgrazing could have reduced the vegetative cover of the range, leaving bare spots on the soil surface, increasing the aridity of the soil, and decreasing rainwater penetration of the soil.* The scenario he developed suggests how overgrazing can change the character of the range, making it more susceptible to the erosive forces of nature, such as wind and rain. Eventually, the sheet and rill erosion caused by these forces result in concentrated channels of water creating gullies and arroyos. *The end result is a loss of topsoil from the range*

and the destruction of farmland as benches along streams are washed away or irrigation facilities are left stranded by ever-deepening streams. Indeed, the primary source cited by both parties on the cause of arroyo spread, R. Cook & R. Reeves, *Arroyos and Environmental Change in the American South- West* 189 (1976), concludes that both climatic changes and overgrazing may have led to the vegetative changes responsible for arroyo formation in the Southwest.

6. Defendant also argued that much of the rangeland that plaintiff claims was overgrazed lies within the area around the center of the reservation that was used only by Indian herds and was never leased under grazing permits. In effect, defendant would place the blame for any overgrazing that may have occurred in that area squarely on plaintiff. Some of the relevant facts are clear. Even before the formal establishment of the reservation,the tribe had raised small herds of cattle. Since the turn of the century, the BIA had encouraged and assisted the expansion of individually-owned herds and tribal herds. Early reports indicated that Indian herds were well-distributed over the entire reservation. However, as more land was given over to permittee stockmen, the Indians' cattle were restricted to a smaller portion of the reservation that was known as the "Indian Range." Although its exact contours varied from year to year, depending on the area leased to permittees, it was generally located across the central portion of the reservation-an irregularly-shaped strip of land spanning from the East Fork of the White River to Cibecue Creek.

The record contains descriptions of an overgrazed Indian Range beginning at least by 1928. Superintendent Donner wrote, "The Indian range in most sections has been exceedingly overgrazed. . . . "[16]Superintendent Donner's ob-

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[16] Superintendent Donner also noted that "considerably more terri-

servations were echoed in a 1932 report by Assistant Forester J. D. Lamont and in a 1936 Grazing Survey. Another 1936 report from soil conservationist Walter V. Woehlke further noted "dangerous sheet and gully erosion" on portions of the range used by individual Indian herds. Defendant argued that the Indians were responsible for any overgrazing that occurred on the Indian Range and cited several documents that attributed the overgrazing to Indian reluctance or refusal to move their herds to the higher elevation ranges during the summer. Such rotation would have relieved the grazing pressure on the lower elevation ranges that were used year-round. So framed, both problem and solution seem fairly straightforward.

However, the evidence suggests the reasons for both the overgrazing and the stationary Indian cattle are unclear. Some overgrazing on the Indian Range can be assumed to have been caused by Indian cattle. Yet, Supervisor Metcalfe noted as early as 1915 that badly overgrazed conditions on the permittee ranges across the northern part of the reservation had caused permittee cattle to drift "in great numbers south of these ranges on to the Indian reserve range, and the cattle of these permittees [to] mix with Indian cattle and graze the Indian range. This damages the Indian range. . . . " The effect of trespassing permittee cattle must be considered as one cause of overgrazed conditions on the Indian Range.

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tory has been taken over for Indian range in order to correct this condition and prevent excessive evaporation and erosion. . . . " Indeed, range maps reveal an expansion of the Indian Range after 1922, but the added range often included areas where overgrazed conditions had been reported earlier. A 1936 Grazing Survey candidly admitted: "Approximately 190,000 acres are being withdrawn from white permittees for Indian use this year. However most of this land is also overgrazed and will relieve the overgrazed condition on the Indian range but little." In these circumstances it is not surprising that observers continued to report overgrazed conditions on the Indian Range.

Another explanation is provided by a 1932 letter from Assistant Forester Lamont to the BIA. Referring to the "badly overgrazed condition" he had found on most of the Indian cattle ranges, he reasoned, "This condition seems to be due to a lack of the proper distribution of the stock over the ranges. This had been brought about by the scarcity of water in some localities and the need for more fences. . . . " Mr. Lamont's observation indicates that insufficient resources on the ranges allocated to Indian livestock forced the livestock to concentrate in areas not large enough to support them without causing overgrazing.

The Indians' reluctance to rotate their cattle between summer and ranges is more complex. Defendant relied on the explanation provided in a 1936 Grazing Survey:

> The main reason that the majority of the Indian ranges are overgrazed at present is that the Indians have always wanted their cattle in their backyards the year around where they could always see them and reach them easily if they wanted one for food. As a result the range in the approximate vicinity of an Indian encampment is badly overgrazed with many annual and poisonous species coming in and gully erosion starting.

If the Indians' convenience were the sole explanation, determining responsibility for overgrazing of Indian cattle would be an easy task. But other equally plausible explanations also appear in the record. For example, it is possible that the size of the Indian Range was insufficient to support the Indian livestock, estimated by Dr. Box to number in excess of 15,000 AU's by 1920. Furthermore, had the Indians wished to move their cattle to higher elevation ranges during summer months, it is unclear just where they were to go. Annual permit maps show that most of the higher elevation ranges in the northern and eastern portions of the reservation were under permit to non-Indians by 1913. By the late 1920's more summer range had

been returned to the Indians, but the years of confinement to the smaller area apparently had instilled in the Indians patterns of stocking cattle not readily altered. Superintendent Donner reported in 1937:

> All outlying sections were leased to white permittees for a great many years. Our Indians became so accustomed to having their livestock in the immediate surroundings of their habitations that it is quite a problem to get them accustomed to having stock out on districts formerly occupied by whites.

Since the evidence indicates that the Government was responsible for at least some of the overgrazing that occurred on the Indian Range, and since defendant had not been able to prove what portion of the overgrazing can be attributed solely to the actions of the Indians, the court finds no basis to treat the Indian Range differently from the reservation's rangeland as a whole for purposes of liability or damages.

7. One other issue of alleged Indian responsibility for overgrazing must be considered. Large numbers of wild horses and ponies also inhabited the rangeland, scattered widely throughout it. Defendant claimed that these animals belonged to the Indians. Although the horses initially were introduced by trespassing stockmen and multiplied in the wild, the Indians apparently considered themselves after some time the true owners of the horses. Complaints about the horses and the overgrazing that they caused appear repeatedly in the historical documents, as do complaints about the Indians' unwillingness to curtail their numbers or assist in their removal. The Government's agents claimed that they did not have the resources to accomplish this task. Plaintiff argued that the tribe also did not have the means to remove the horses; but it is unclear whether the true impediment was the tribe's lack of wherewithal or the Indians' attachment to the horses. Although some damage was done to the range by overgrazing of wild

horses and ponies, the parties have not provided sufficient evidence to enable the court to determine who bears the ultimate responsibility in this instance.[17] Therefore, any contribution to the deterioration of the rangeland will not affect the measure of damages.

8. It has been found that overgrazing was a causative factor in the erosion that took place on plaintiff's range before 1946. Next to be ascertained is the amount of erosion attributable to overgrazing. Plaintiff took the position that overgrazing was the exclusive causal factor based on Mr. Kaczmarek's testimony that he considered and discounted climate as the causal factor. Even considering Mr. Kaczmarek's affidavit to amplify his rather conclusory testimony, *see, e.g.*, Affidavit of Michael B. Kaczmarek, dated June 27, 1986, §§ 58, 67, the witness convincingly could not eliminate climate as a profound force in this part of the southwest. Defendant took the opposite tack contending that, irrespective of any overgrazing, erosion on the reservation was caused by naturally occurring devastating climatic variations, *i.e.*, climate superseded any other causal agent.

Mr. Kaczmarek's soil erosion measurement plots proved to be largely inconclusive about the rate of erosion on the

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[17] In Dr. Elliott's affidavit, *see supra* note 13, plaintiff attempts to place responsibility for the wild horses on the Secretary of the Interior by quoting a 1936 letter from Robert Marshall, Directory of Forestry. Elliott Aff. ¶ 57. This letter makes reference to the Indian Reorganization Act, which outlines the Secretary's duty to restrict the number of livestock grazing on Indian ranges. If the letter, which bears no exhibit number, had been introduced into evidence as an exhibit, either at trial or by reference in an expert report, it is likely that plaintiff would have prevailed on the issue of wild horses, at least as to acts after 1934. Plaintiff's failure to follow through on its proof leaves the court unable to resolve the question of responsibility for the horses. Nevertheless, this uncertainty has the effect of benefiting plaintiff because the measure of damages will not reflect damage due to grazing by horses.

reservation.[18] Mr. Watson presented on behalf of plaintiff an analysis of the relationship between historical precipitation measurements and streamflow data at locations both on and off the reservation. He attempted to demonstrate indirectly the cause and effect relationship between overgrazing and erosion by linking the peak period of reported overgrazing with a contemporaneous increase in runoff of water from the Salt River watershed. Mr. Watson first compared the precipitation measurements over time for two locations, the Whiteriver/Fort Apache stations (on the reservation) and the Natural Bridge station(off the reservation on the Verde River). Finding the recorded precipitation at both to be equivalent, he next compared the net runoff of the two watersheds by analyzing the historical streamflow data from two measuring stations further down the Salt and Verde Rivers, respectively. He then compared two periods in particular, 1917-1925 (plaintiff's claimed peak period of overgrazing) and 1941-1957, and found that the average summer (July-September) streamflow for the Salt River near Roosevelt Dam fell from 141,716 to 70,861 acre feet between the two time periods. Meanwhile, the equivalent streamflow for the Verde River decreased by only 15,650 acre feet.

Mr. Watson testified that precipitation for both measuring sites was relatively constant between the time periods.[19] He attributed the diminished net runoff on the Verde watershed to evaporation from the water stored at

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[18] The testimony of defendant's expert geomorphologist Dr. William L. Graf undermined the value of Mr. Kaczmarek's study by critiquing the insufficient size of his samples, the lack of random distribution, and the remote timeframe (current) in which they were taken. The primary deficiency with this study is that measuring the rate of erosion on the reservation does not equate the present rate of erosion to overgrazing.

[19] However, missing precipitation data for the Fort Apache station during the years 1919-1920 readers the comparison, and ultimately the conclusions drawn from it, less than certain.

Horseshoe and Bartlett Dams, both constructed between the two measurement periods. For the higher net runoff figure along the Salt River watershed during the earlier period, Mr. Watson found the most likely explanation to be changes occurring in the vegetative cover on the reservation, more specifically overgrazing and timber harvesting.[20] The close temporal proximity of reports of overgrazing (and extensive timber harvesting) and a likely manifestation of erosion—namely, heightened water runoff from the altered landscape—was offered to corroborate plaintiff's contention that overgrazing and denudation of the rangeland in fact had occurred during or immediately prior to 1917-1925 period. It also showed a causal link between the overgrazing and eroded conditions on the ranges.

Mr. Watson's streamflow/precipitation analysis has several significant flaws, however, which were identified by defendant's expert Dr. Brockway. The most damaging revelation was that "as much as 500,000 acres of the [Salt River] drainage basin may lie beyond the Mongollon Rim [the northern geographic boundary of the watershed]. . . . " A 1936 University of Arizona technical bulletin by Cooperrider and Sykes explains that large underground springs originating at sources beyond the reservation contribute to the Salt River's streamflow. This fact serves to diminish the utility of the precipitation data from Whiteriver/Fort Apache, because it greatly increases the area of potential sources of the flow of the Salt River and undermines confidence that an apparently constant rainfall total at Whiteriver/Fort Apache truly was representative of a watershed-wide precipitation constant.

Other problems arise, as well. Dr. Brockway's comparison of the precipitation data from the Whiteriver/Fort Apache station and other stations on and near the reser-

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[20] Mr. Watson noted that the Unit One timber cut began in 1918.

vation shows a lack of correlation between the Whiteriver/Fort Apache station and the others. This further detracts from the representativeness of the Whiteriver/Fort Apache data.

Another objection can be found in Mr. Watson's use of average streamflows for the entire periods of comparison, 1917-1925 and 1941-1957. Simply comparing the arithmetic average summer streamflows appears to reveal a rather substantial increase in streamflow for the 1917-1925 period. But, as Dr. Brockway pointed out, elimination of three aberrationally high months from the data would reduce the average summer streamflow for the period from 141,716 to 92,755 acre feet—a far less significant deviation from the 70,861 acre-feet average of the 1941-1957 period.

The analysis provided by defendant's expert in meteorology, hydrometeorology, and climatology, Dr. William H. Haggard, further diminished Mr. Watson's analysis. Dr. Haggard replotted Mr. Watson's precipitation/runoff data and concluded that the relationship is not linear, but rather curvilinear, Dr. Haggard explained how the unusually high streamflows recorded, particularly in 1919 and 1921, could be attributed to greater than normal rainfall, which produced a greater runoff per unit of precipitation than would lower levels of precipitation. In sum, Mr. Watson's analysis and conclusions are constrained by the limitations of his data and add little to the concurrent observations of overgrazing and erosion during the period roughly from 1914 to 1927.

9. Defendant presented its climatic variability theory of erosion by way of two witnesses, Dr. Haggard and Dr. William L. Graf, an expert in geomorphology. Dr. Haggard described the reservation as "the region of greatest climatic contrasts and variability" in Arizona, and presented evidence detailing the annual patterns of localized, often intense, winter and summer precipitation events on the reservation. He also included chronological reports of the

nature of, and damage from, these storms. Finally, using historical precipitation and streamflow data and indirect soil moisture indices, Dr. Haggard attempted to show how alternating drought and moist periods coincided with the approximate time of reported erosion. Specifically, the period 1899-1904 was a period of drought, followed by rapid transition to very wet conditions by 1905, which continued through 1920. According to Dr. Haggard, the summers of 1919 and 1921 produced exceptionally high levels of rainfall, and flood-level streamflows occurred in January 1916. Such examples of large episodic climatic changes on the reservation were responsible for conditions in which increased streamflows intensified the rate of natural erosion, according to Dr. Haggard.

The focal point of Dr. Graf's testimony was his statistical analysis that attempted to quantify the relative influences of climate and grazing on erosion. Dr. Graf's regression analysis correlated variations in measured streamflows, which he considered indicative of sediment transport and, in turn, the degree of erosion, with variations in climate and livestock numbers. According to Dr. Graf, climatic variation accounted for 55 percent of the variation in streamflow, while stocking variations explained only one percent of the streamflow. Therefore, he concluded that climate was a far more significant factor in erosion than was grazing.

Dr. Graf's methodology, and hence his conclusions, suffer from the uncertainty inherent in several assumptions underlying his calculations. The first is that changes in numbers of reported livestock are the proper measure of the effect of grazing as a variable to be used in the regression analysis. As Dr. Graf admitted, data concerning the distribution of livestock, had they been available, would have been significant for this type of analysis. Dr. Graf also stated that it would have been preferable to use the distribution in vegetational changes as the variable for grazing effects. The court is not convinced that variation

in livestock numbers, by itself, accurately reflects the contribution of overgrazing to the erosion that occurred. Second, the assumption that variation in streamflow at a single location on the Salt River is an accurate indicator of the extent, nature, and timing of erosional events on the entire reservation must be viewed with the same skepticism as it was in plaintiff's precipitation/streamflow analysis. Third, the apparent statistical correlation between contemporaneous changes in the climate and changes in streamflow (or even erosion) simply does not address the influence that previous incidents of overgrazing may have had in increasing the susceptibility of the range to subsequent erosive forces of the climate.

Dr. Graf also attempted to bolster defendant's climatic theory by noting that an earlier episode of apparently heavy livestock grazing in New Mexico did not result in accelerated erosion or arroyo cutting. However, inspection of the less-than-complete document submitted by defendant, and written by William Denevan under the title "Livestock Numbers in Nineteenth-Century New Mexico, and the Problems of Gullying in the Southwest," reveals the author's (or the abstractor's) view that the study "also gives some new support to the older view that overgrazing was a major contributive factor causing severe modern gullying." In particular, Mr. Denevan explains why overstocking was associated with erosion in the Southwest in the 1880's, while the earlier high stocking levels did not produce erosion:

> The lack of gullying in the 1820's and 1830's when sheep numbers were relatively high can be attributed to higher than average annual rainfall and a vegetation cover that was in substantially better overall condition than it was in the 1880's when overstocking followed a period of subnormal rainfall. . . .

Furthermore, to the extent that Dr. Graf criticizes plaintiff's association of erosion events on the reservation

with those occurring in southern Arizona, he gives no assurance that his similar comparison with erosion events in New Mexico yields any more meaningful conclusions.

Finally, the sequence of overstocking/overgrazing and erosion both on the reservation and elsewhere in Arizona lends support to plaintiff's theory that a causal relationship existed between overgrazing and erosion. The introduction of large numbers of livestock onto most Arizona ranges occurred during the 1870's and 1880's. By the 1890's observers noted the ranges to be in an overgrazed condition, and accelerated erosion and arroyo cutting soon followed. That this phenomenon was not repeated on the reservation until the 1910's and 1920's has two possible explanations: 1) The climate on the reservation was so different from the rest of the Arizona that the climatic conditions necessary to cause accelerated erosion were not present until 30 years later; or 2) the erosion observed on the two areas was in some way influenced by the overgrazed condition of the land.

[18] Although defendant's witnesses testified to the variety of climates found in Arizona, they presented no climatic data to show how the reservation's climate was so unique as to escape the fate of accelerated erosion that beset surrounding ranges during the 1880's and 1890's. The repetition of the sequence of overstocking, overgrazing, and erosion is not conclusive proof of a causal relationship between grazing and erosion, but it is compelling evidence. It reinforces the court's finding that neither climate nor overgrazing was the sole cause of accelerated erosion on the reservation, but rather that the overgrazed condition of the reservation's rangeland predisposed it to the erosive forces of the climate, ultimately resulting in the damaged and eroded condition that persists today. *Since the Government initiated and condoned the stocking conditions that produced overgrazed rangeland, in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted.* This finding that the Government is responsible

for overgrazing must be qualified, however. The predisposition of the range to the erosive forces of climate is not tantamount to a finding that defendant is responsible for all the erosion visible over half a century later. Dr. Haggard's testimony was eloquent on the devasting effects of rainfall northeast of Phoenix. Absent overgrazing, climate would have inflicted damage. But it cannot be found that climate was the superseding causative agent during the period 1900-1935. The evidence reveals how climate operates in naturally arid or overgrazed land. It does not show that range not subjected to overgrazing suffered the same consequences as overgrazed range. For its part plaintiff has not quantified the acreage, but argues for all its range. This approach ignores the role of climate. Consequently, the court has made adjustments in plaintiff's analysis of diminished carrying capacity to account for the role of climate.

10. Another facet of plaintiff's claims for mismanagement of its rangeland involves the encroachment of juniper trees onto the rangeland. Although the primary focus of this claim is juniper trees, it also includes to a lesser extent pinyon pine trees. The discussion speaks in terms of "juniper" to include pinyon trees, as well.

This claim is intimately associated with plaintiff's erosion claim, because plaintiff alleges that overgrazing the livestock reduced the vegetation cover of the land. According to plaintiff, the resulting condition both gave juniper seedlings a greater opportunity to establish themselves among the grasses and reduced the frequency of fire hazard to young junipers. As junipers proliferated, plaintiff argued, grasses and other range forage suffered from the competition and the ranges experienced a decrease in carrying capacity.

Dr. Elliott presented documents and testimony in support of this claim. Both Dr. Box and he agreed that juniper has increased in density throughout its normal range, both

on the reservation and in other areas of the Southwest since about the turn of the century. A 1924 article by Aldo Leopold of the United States Forest Service sets the beginning date for brush (including juniper) encroachment of the ranges in southern Arizona at the mid-1880's. This would coincide with the timing of the heaviest livestock grazing in that area. The article attributed the cause of juniper proliferation to the effects of overgrazing, namely reduced risk of fire damage and lowered competition by grasses for water and soil nutrients. Mr. Leopold further supported this theory by establishing the date of the onset of the juniper invasion through inspection of tree rings, which indicated an even-age stand of trees all less than 40 years old. On the reservation the juniper encroachment was first noticed during the 1930's, which implies that the infestation began sometime earlier. Associate Regional Forester W. R. Centerwall observed in 1941:

> During the past six years, during which period the ranges of the Fort Apache Indian Reservation have been under close observation by the writer, the effect of Juniper and Pinyon Pine rangeland invasion has been very evident and pronounced. Thousands of acres of good grass-covered range land are being encroached upon, to the extent that within a short period of time they will become entirely useless insofar as forage resources are concerned.

Dr. Elliott also conducted more extensive tree-ring studies revealing that the vast majority of juniper trees had taken root since 1918. Again, this coincides with the heaviest grazing period on the reservation.

Defendant does not dispute that juniper encroachment has occurred on the reservation. Defendant also agreed, through Dr. Box, that "cessation of fire" and "heavy livestock grazing" are major contributing factors to juniper increase. Defendant instead argued that Dr. Elliott's analysis of causation ignores climatic variations. However,

defendant offered insufficient evidence of its own to suggest that climate was the agent responsible for the spread of junipers across the reservation's rangeland. By comparison the cumulative weight of plaintiff's tree-ring data, historic observations, and evidence of the difference in the timing of contemporaneous overgrazing and juniper spread between ranges on and off the reservation make plaintiff's evidence more persuasive.

The proofs do not answer a controlling factual question, however. Juniper occurs naturally in the region; in fact, it was present on the reservation before the onset of overgrazed conditions and key climatic events triggering destructive drought/flood episodes. Absent overgrazing, it is likely that climate would have caused conditions conducive to the infestation of juniper. On the other hand, overgrazing predisposed the affected range to the spread of juniper. Just as the Government must bear responsibility for erosion damages to the rangeland caused by overgrazing while the land was under its supervision, it must also be held liable for any loss in carrying capacity of the rangeland due to juniper infestation brought about by overgrazing and not climate. Plaintiff measures its loss by reduction in carrying capacity, irrespective of cause, *i.e.*, erosion caused by overgrazing or juniper infestation caused by overgrazing. Accordingly, adjustments to account for the effect of climate on Dr. Elliott's carrying-capacity analysis allow for the role of climate in creating the conditions amenable to juniper infestation.

Plaintiff also argues that government efforts to remove juniper from the rangeland actually aggravated the situation by making the soil around uprooted junipers hospitable to juniper seeds. According to the 1949 Annual Report, the first juniper eradication on the reservation occurred in 1939 when Civilian Conservation Corps ("CCC") crews cleared approximately 200 acres in the Cedar Creek area by hand-chopping and some tractor work. In 1941 W. R. Centerwall, Associate Regional Forester,

proposed that a juniper eradication program be studied and undertaken on the Grasshopper Range. Funding for the small CCC projects ended during World War II. After the war, programs were begun by the Indians using tribal funds with Government assistance and encouragement, according to the 1947 Annual Report. As of 1947 it was reported that 650 acres were controlled. Plaintiff has not shown by a preponderance of evidence that the juniper eradication program begun (whether or not completed) prior to August 13, 1946, added to the infestation in respect of the 650 acres, even assuming that plaintiff could have identified adequately the treated area.

B. *Claims for fraudulent mismanagement*

Overarching all of plaintiff's claims concerning alleged government mismanagement of the range resources is its claim that each and every aspect of the Government's supervision of, and activities on, plaintiff's range was undertaken for the purpose of increasing the production of water flowing off the reservation for the benefit of the SRVWUA and other downstream users.

Examining first the possibility that the Government conducted the grazing permit program to increase the production of water, it is evident that plaintiff has not carried its burden of proof. Plaintiff made no showing that the government mismanagement that allowed the ranges to become overgrazed and eroded included any intent by the Government to increase streamflow to downstream users. The most plaintiff proved was an awareness by the Government of some of the consequences involved, including questions to be considered in any attempt to increase water production through manipulation of the vegetation. Plaintiff's argument draws heavily on a technical bulletin by Cooperrider and Sykes of the United States Forest Service, who stated in 1938:

> [I]t is apparent that methods for obtaining increases in water yield through destroying and even thinning

> and changing vegetation must be proved before they may be practiced with any degree of safety. Deterioration of vegetation is accompanied by deterioration of soils, and vegetation and soils cannot be replaced at will. . . . Although some increase of surface runoff may be obtained through general destruction of watershed vegetation, the possibility of increasing the total water yield through such means is very limited and is fraught with great dangers. . . .

Such comments express a sense of caution against altering the vegetation rather than a plan to alter it. Moreover, the reaction by Superintendent Davis in 1924 upon observing an apparent increase in streamflow due to "the more denuded condition of the ranges on the sides of the mountains," weighs heavily against plaintiff's theory that the Government intended to exacerbate the situation to increase water production: "I intend to make still further reductions [in cattle] in some areas, largely with a view of overcoming the erosion during the flood seasons. . . . "

Regarding plaintiff's contention that government-sponsored juniper eradication programs were also designed to increase water to the non-Indian downstream users, it is important to distinguish between those projects undertaken before 1946 and those occurring after 1946. As was outlined above, the pre-1946 juniper control projects funded by the CCC were small experimental attempts to recover grazing land from the encroachment of junipers. No mention was made in any of the documents discussing these projects that increased water production was the objective. There was nothing wrongful, in this sense, about these government projects. These efforts ended along with their funding during World War II.

C. *Claims for continuing wrong*

Under the continuing wrong analysis discussed in conjunction with plaintiff's claims for mismanagement of water resources, any wrongful conduct found to have occurred

after August 13, 1946, must have begun before that date and must have been continuous. *See Navajo Tribe of Indians*, 218 Ct.Cl. at 20, 586 F.2d at 198. The obstacle that prevents a finding of continuing wrong in the Government's management of grazing on the rangeland is that the Government's actions constituting mismanagement, *i.e.*, allowing overgrazing by permittees, had ended by 1946. The activities causing the loss in carrying capacity and erosion were the overstocking and overgrazing of the ranges. Plaintiff offered no proof that these activities continued beyond 1946. To the contrary, the evidence showed a large decrease in the number of permittee livestock between 1927 and 1928, and a gradual phasing out of the permit system through the 1930's and 1940's, until its elimination in 1953. By 1946 permittees were grazing only 1,250 livestock on the reservation. Plaintiff presented no evidence either that this number exceeded the carrying capacity for the permittee ranges or that the permittee livestock were overgrazing their ranges after 1946. Plaintiff did allege that erosion has continued from before 1946 into the present. However, plaintiff's expert Mr. Kaczmarek stated that, based on his examination of aerial photographs taken in 1935 and in the 1980's, by 1935 the magnitude of erosion on the reservation essentially was the same as it is today. Both he and Dr. Elliott also testified that the carrying capacity of the range in 1946 was much the same as it is today.

Plaintiff similarly argued that the Government's juniper eradication program constituted a "continuing wrong," under the decision in *Navajo Tribe of Indians*, 218 Ct.Cl. at 20, 586 F.2d at 198, thereby escaping the jurisdiction bar. However, the central element of *Navajo Tribe of Indians'* three- part test for a continuing wrong is that any wrongful conduct by the Government must have been continuous, before and after August 13, 1946. Although the post-1946 Government supervision of the grazing activities on the rangeland both affected the growth and extent of junipers,

they were different activities. They lack the continuity necessary to overcome a congressionally-mandated time limitation on liability for government acts.

The more extensive juniper eradication program, which began in 1947 after the statutory cutoff date for acts compensable under the Indian Claims Commission Act, was funded jointly by the tribe and the Government. Its objective was the reclamation of grazing lands, not water production. However, later experimental projects clearly were conducted in part to measure the enhancement of water production that could be obtained by clearing junipers from areas in specific watersheds. Among these were the Corduroy Creek (1956), Cibecue Ridge (1959), and Cibecue (1960) experiments. The 1956 report, *Recovering Rainfall*, by George W. Barr of the Arizona Watershed Program, which plaintiff claimed inspired these projects, advocated both juniper removal from watersheds and careful studies of the effect on water yield. Although the SRVWUA advocated that juniper be eradicated in order to yield more water, that fact does not equate to a finding that these three experimental projects manifested government exploitation of the range for water. Removal of the infestation was itself a legitimate objective, as urged by Tribal Chairman Lester Oliver in 1955, and the results regarding enhancement of water yield were inconclusive. The pre-1946 projects did not constitute "wrongful conduct," in that enhanced water production was not their objective. The post-1946 projects are discontinuous from the earlier ones.

Moreover, the incipient cause of the encroachment was overgrazing, but the overgrazing had ended by 1946. The delay in adjudicating these claims makes impossible the determination of the extent to which the Government must bear responsibility for juniper infestation. Climate played a role in creating the conditions that made the range susceptible to juniper encroachment. The evidence does not show that it would have occurred absent overgrazing, nor

does it show that absent the effects of climate juniper infestation would have occurred to the extent reported in 1946. There is no justification in the record to attribute the entire juniper infestation to overgrazing or to find overgrazing as a causative agent beyond its discontinuance. Therefore, any harm that may have been caused to the rangeland by Government-sponsored juniper eradication programs is beyond the jurisdiction of this court to consider further.

Having found no continuing wrong to exist with respect to any of the claims for mismanagement of the range resources, the court will analyze damages only for liability predicated on Government activities occurring before August 13, 1946.

D. *Damages*

Both parties developed and presented proofs on the measure of damages for the range resources. At the court's direction, they also presented revised versions of some of their damage calculations. Not surprisingly, the parties differed substantially in their preferred measures of damages, amounts of damages, and assumptions underlying their calculations. Neither side was able to persuade the court to adopt its measure of damages in its entirety, because both presentations suffered to some extent from shortcomings in their underlying assumptions. In its attempt to arrive at a proper measure of damages, the court has carefully analyzed both parties' presentations and has drawn heavily from each. " '[T]he fact finder is not required to choose between swallowing an expert's report whole, or rejecting it utterly, and usually, neither course is right.' " *Seminole Indians of State of Florida v. United States*, 197 Ct.Cl. 350, 361, 455 F.2d 539, 545 (1972)(concurring op.)(quoted in *Navajo Tribe of Indians*, 9 Cl.Ct. at 391). This section will explain the various measures of damages that each party sought to prove and will note the reasons why the court finds each method insufficient to some degree.

The greatest difficulty hampering a precise calculation of damages is the historical nature of the claims. Because events and conditions occurring on the reservation's rangeland over periods of time dating back 100 years could not be described by percipient witnesses, the parties and the court have had to rely largely on information contained in historical documents. Except for present-day inspections of, and a few experiments conducted on, the rangeland by expert witnesses, these witnesses have had to base their analyses and conclusions on observations, estimates, and data contained in the historical documents. For those events and conditions long ago, the documents are the best evidence available. Yet they are often incomplete and provide less information than would be necessary to establish damages with precision.

Recognizing the handicap placed on the parties in their damage presentations, the court has attempted to choose from among the methods and analyses and used those aspects of each which engender the most confidence. In effect, the final amount will be the product of what is known as a "jury verdict." This type of generalized view of damages, which draws upon some of the parties' presentations to reach a final sum in much the way a jury would, is an accepted method under the law of this court in such circumstances, *see Navajo Tribe of Indians v. United States*, 9 Cl.Ct. at 429, 439-40; *G.M. Shupe. Inc. v. United States*, 5 Cl.Ct. 662, 736-37 (1984), and has been approved by the Federal Circuit in *Branning v. United States*, 784 F.2d 361, 364 (Fed. Cir.1986)(taking case). The rationale for jury verdicts can be found in the " 'settled principle that where the fact of damage has been established, absolute certainty or precise mathematical accuracy as to the amount of damages is not necessary.' " *Petrovich v. United States*, 190 Ct.Cl. 760, 766, 421 F.2d 1364, 1367 (1970) (quoting *Dale Construction Co. v. United States*, 168 Ct.Cl. 692, 729 (1964)).

Both in its Summary of Damages filed on March 21, 1986, and at trial, plaintiff sought to prove damages for the rangeland first by a "cost of restoration" method. Under this proposed method, the Government would be required to pay an amount equal to the cost of restoring the soil resources of the entire range, including removing all juniper, regarding the land, and reseeding the grasses. Plaintiff's experts calculated a total figure in excess of $230 million. However, an order granting in part defendant's motion *in limine* on water and range claims excluded the section of plaintiff's Summary of Damages dealing with the cost of restoration. *White Mountain Apache Tribe v. United States*, 10 Cl.Ct. at 118. As more fully explained in that order, the established measure of recovery recognizes diminution in market values as the proper measure of damages if the cost of restoration exceeds the diminution in market value of the rangeland. *Id.* at 117-18. The central remaining damages issue to be determined is how best to measure that diminution in market value.

To this effort plaintiff's expert Mr. Wicks substantially contributed by establishing that diminution in value based on market value of a piece of property is an unworkable method to value an Indian reservation. Among the factors unique to valuing a reservation as a piece of property, in Mr. Wicks' view, are that discrimination distorts the value of the property and that valuing a piece of property with its highest and best use as a reservation does not have meaning in the commercial world. Finding comparable properties would be almost impossible. Mr. Wicks therefore used the income approach to measure market value. Because he has used this method in his real-world appraisals of Indian reservations, the court deems it reliable.

Plaintiff chose to calculate diminuuion in market value by hypothesizing a cattle-raising business large enough to utilize exactly the carrying capacity of the entire rangeland of the reservation in its pristine condition. Although In-

dians on the reservation have been raising and selling cattle throughout this century, there is no evidence that plaintiff as a tribe could or would have managed a venture of the magnitude postulated. In fact, the tribal herd, as it was called, was used to stock the herds of individual Indians. The amount of initial stocking for the tribal herd in Dr. Elliott's damage calculations was hypothetical. Also, it is far from certain whether the tribe had sufficient revenues to launch this enterprise.

In Dr. Elliott's view, adding together the revenue from beef sales and earnings from labor that would have been generated by fully occupying the rangeland yielded a hypothetical "stream of income" that represents the diminution in market value. Plaintiff later recalculated the damages to include only the projected beef sales, after defendant pointed out that potential earnings from labor were individual not tribal revenues.

Dr. Elliott calculated diminution in carrying capacity for plaintiff. Using a combination of Soil Conservation Survey ("SCS") soil maps and range survey results from Mr. Kaczmarek, Dr. Elliott developed a range site map of the reservation. He then sampled what he considered to be representative sites to determine the range condition on each site. From this data Dr. Elliott calculated both existing and potential carrying capacity in pristine condition (based on 85 percent of climax vegetation) for each site. His final figures showed the carrying capacity of the entire reservation to have decreased from 40,874 AU's to 17,997 AU's, for a diminution of 22,877 AU's. Defendant attempted to challenge Dr. Elliott's range sampling methodology, suggesting that substantial acres of the reservation were omitted. However, Dr. Elliott testified that his sampling sites were representative of the entire reservation. Defendant also suggested that 31,000 AU's was a more accurate estimate of the carrying capacity before overgrazing; yet defendant's expert Dr. Box admitted that 31,000 was only indicative of a broad, esti-

mated range of what the carrying capacity might have been. The court notes that Dr. Elliott's analysis was his first of this type and Dr. Box credibly explained that accepted range management practice does not strive for rangeland in a near pristine state. Nonetheless, since defendant presented less justification for its figures than did plaintiff for its own, and since estimated carrying capacity appears to have varied greatly throughout the years, plaintiff's figures on carrying capacity will be accepted as the more reliable.

Mr. Kaczmarek presented damage calculations, supported by Mr. Wicks, for the hypothetical cattle operation by capitalizing potential profits over time to arrive at alternate present worth values of $7,965,360 and $7,416,414—the latter value premised on an assumption of Indian responsibility for 50 percent of the damage to the Indian Range. Two significant problems with this proposed measure of damages require that it be rejected. First, the damages calculated represent lost profits for an unestablished business. This is also the key flaw in Dr. Elliott's damage study. As the court ruled previously on this issue, "The likelihood of profits from a new venture is too uncertain for loss of anticipated profits to form a reliable measure of the damage suffered." *White Mountain Apache Tribe*, 10 Cl.Ct. at 118. Second, plaintiff did not justify sufficiently its categorization of land into Indian Range and permittee ranges, given that some land changed from one status to another at various times.

Defendant, through Dr. John P. Workman, an expert in appraisal and range management, also proposed measures of damages. The court deems Dr. Workman's testimony especially persuasive. Range management was not a claim wherein one party proved its entitlement to everything it wanted. Plaintiff sought maximum recovery on the theory that defendant would be held responsible for all the erosional damage to its reservation. Defendant took the position that, even assuming liability for some unspecified

damage, plaintiff suffered no damages because the grazing revenues offset the damage that obtaining them caused. What Dr. Workman brought to the stand was the flexibility to adjust his calculated variables. His adjustments compensated for the fact that no one could ever know in a case tried more than 60 years after the peak overgrazing how much of plaintiff's rangeland was damaged by overgrazing independent of climate.

Dr. Workman made three sets of calculations, which he later modified at trial at the court's request in order to incorporate certain assumptions and data more favorable to plaintiff. The court deems these adjustments warranted by its findings on liability, *i.e.*, plaintiff was not responsible for wild horses and ponies. In essence, defendant's main approach had been to use the calculated potential carrying capacity of approximately 41,000 AU's to produce two figures: 1) the difference between the amount actually realized from grazing permits (plus value to Indian cattle grazed on the ranges) and the amount that could have been realized by leasing all ranges up to their potential carrying capacity; and 2) the capitalized value of the portion of potential grazing fees representing the diminution of carrying capacity in 1946. The sum of these figures represented the net benefit or loss to plaintiff, as measured by the potential lease of all grazing lands to non-Indian livestock owners.[21] Dr. Workman's method yielded modest damage figures, in part, because the revenue to plaintiff from the permit program was offset against the value of the damage to the ranges from that program.

This method contrasted sharply with the two other approaches presented by Dr. Workman. The second method was a recalculation of plaintiff's hypothetical cattle operation, which already has been rejected because of the un-

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[21] Dr. Workman testified that leasing the grazing land to livestock owners yields a higher value than grazing one's own cattle or using the land for hay production.

certainty involved in assuming both the existence of a large tribal herd and speculative profits. He calculated profit for head of cattle run, not sold, which was a low figure because the Indians consumed a lot of the livestock. This analysis netted plaintiff $15,750 and is rejected because the price per head is artificially low. The third method was one that Dr. Workman deemed a "worst case scenario." It allowed plaintiff the benefit of several assumptions (1) by adopting: a) 1898 as the starting date for reduced carrying capacity; b) a carrying capacity reduction from 41,000 to 19,000 AU's; c) $3.00 per AU as the potential leasing value for all years; and (2) by ignoring as offsets all benefits the tribe derived from overgrazing *i.e.*, permit revenue and grazing value to Indian cattle. Under this method damages totaled $4,950,000. This method is unacceptable because it has the effect of overcompensation. It compensates plaintiff fully for all harm caused by the overgrazing, yet makes no deduction for the benefits through grazing fees that plaintiff received from overgrazing. Nevertheless, this method is useful in the court's jury verdict determination of damages. It represents an upper limit on damages because it is structured as the scenario most favorable to plaintiff.

The most reasonable starting point for developing a jury verdict amount is Dr. Workman's first revised method, DX H-1, table 7a. That method began with a potential grazing value of $2,097,000, reduced by the actual permit revenues received of $1,520,000, which totaled $1,477,000. Added to that figure was the capitalized amount of the reduced range value, or $1,650,000, yielding a total damage figure of $3,127,000. This formulation is favorable to plaintiff in that it omits any reduction for the grazing value to Indian cattle.[22] It also adopts plaintiff's carrying ca-

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[22] It also properly omitted any reduction for wild horses, which were determined in the liability section not to be the responsibility of the Indians.

pacity figures which the court found acceptable, for pristine (41,000 AU's) condition. The present/1946 condition is 19,000 AU's, reflecting an upward adjustment of 2,000 AU's, a less significant reduction in carrying capacity than urged by Dr. Elliott. In the court's view, this adjustment compensates for the influence of climate as a cause of erosion.

The adjustments in the data that are beneficial to plaintiff are weighed against defendant's insistence on using historical grazing fee figures in its calculation of potential grazing value. Defendant's figures, intended to represent the price at which the land could be leased for grazing when stocked to its pristine carrying capacity, are instead the actual prices at which the land was leased in its often overstocked and overgrazed condition. Therefore, the grazing fee numbers used yield a potential grazing value that is too low. It is difficult, perhaps impossible, to know what value the reservation's rangeland would have brought in permit fees each year had it not been overgrazed. The court has compensated for this understatement by adding $500,000 to Dr. Workman's final figure.

Such difficulties, when unresolved by the parties' damages proofs, highlight the utility of using a jury verdict amount of damages. It becomes a means for achieving a result that is fair and just to both parties when neither party has been able to present an independently complete or acceptable measure of damages. On this basis the court determines that the amount of damages for plaintiff's rangeland to be $3,627,000.

III. *Claims for mismanagement of timber resources*

Plaintiff's third set of claims focuses on the Government's management of the timber resources on the reservation. Plaintiff alleges that sections of the forest harvested for timber since 1918 were overcut, resulting in a loss of growth in the trees during the years since the cuts and for future years. Plaintiff also made claims for the value

of timber harvested and used by the U.S. Army between 1870-1917; for the value of timber cut by the BIA and processed through government-owned and private sawmills; for the Government's handling of forest fires; and for the Government's practice of prescribed burning of natural debris on the forest floor. In addition, plaintiff claims that by overcutting the forest, the Government both forced the Indian- owned Fort Apache Timber Company ("FATCO"—the acronym used by plaintiff) to expand its sawmill facilities and created the preconditions for future reductions in employment income to tribal members when future harvests are reduced to compensate for earlier overcutting. Finally, plaintiff claims that the Government's entire forest management scheme and practices throughout the history of the reservation was motivated by the desire to increase the streamflow from the reservation.

The reservation is forested over 1,061,000 of its acres, more than 685,000 acres of which are commercial forest. The commercial forest covers the northern and eastern regions of the reservation and spans altitudes from 6,000 feet above sea level to the timberline at 10,000-11,000 feet. The forest currently serves multiple land-use objectives, from recreation, water, and wildlife to grazing and timber. In terms of direct revenue production for the tribe, timber harvesting is the predominant use. The primary species harvested is the ponderosa pine. *This type of tree ordinarily does not become of merchantable quality for lumber until it reaches the age of 130-150* years. At younger ages its only harvestable value is as pulpwood.

Timber has been harvested on the reservation since the Army began cutting trees in the 1870's around Fort Apache to supply timber for a sawmill located near the Fort Apache Agency. From the date of the establishment of the Fort Apache Indian Reservation as a separate reservation in 1897 through 1908, neither the Government nor the tribe undertook any efforts to harvest the timber resources on a larger scale. In January 1908 the Forest

Service became responsible for Indian timberlands under a cooperative agreement with the BIA. This arrangement lasted until July 1909. By executive order, President Roosevelt transferred the reservation's forest lands to the adjacent Sitgreaves and Apache National Forests in March 1909. The Forest Service administered these annexed portions until 1912 when the earlier executive order was rescinded.

Beginning in 1918 with the Unit One sale ("Unit One"), the BIA and tribe contracted with outside timber companies to cut several large areas of the forest. The BIA developed the first Management Plan for the reservation's forest in 1944 and has written new Management Plans at various intervals since then. Throughout this time both silvicultural practices and timber harvesting methods have undergone considerable changes. For example, early timber cutting was planned according to the "working circle" method by which timber was cut in a radius around a small sawmill, and the sawmill was moved to the next location when the timber within easy reach was exhausted. Later cuts were accomplished under the "railroad logging" method. A railroad was constructed into the forest while areas adjacent to it were cut. The timber company would remove the tracks upon completion of the cut. Timber companies conduct modern harvests by "truck logging" in which they cut logging roads into the forest and transport the logs by trucks to sawmills offsite.

A small tribal sawmill and planing mill, originally operated by the Indian Service, during the relevant time period for damages. By 1978 there would have been 1,467 BF of additional volume per acre. Multiplying this figure by a 1978 stumpage rate of $47 per thousand BF and by the 37,786 acres, yields a damages sum of $2,605,307.

Plaintiff's calculations must be faulted for their inclusion of anticipated mill profits, which they claim would have resulted from the availability and utilization of the timber

from 50 years additional growth. Such speculative profits constitute an improper measure of damages and are not allowable. *See Nealy v. United States*, 152 Cl.Ct. 137, 146, 285 F.2d 438, 443 (1961).

The Government correctly notes that a deduction from the damages must be made for the present (1978) value of income that plaintiff originally received for the portion of excess timber cut from Unit One. This adjustment is necessary to avoid the partial double compensation that would result if plaintiff were allowed both to keep the original sale price of the excess timber cut and to be compensated later for the full value of the additional timber that would have existed in 1978, but for the earlier overcutting. Unfortunately, the Government offered neither a sum to subtract nor a method of calculating the portion of Unit One revenues attributable to the overcut timber. Dr. Latham merely contended that "the indicated damages become zero at any interest rate greater than 7.75% up to 1978." This assertion offers little guidance in the court's assessment of damages. Furthermore, the 7.75 percent interest rate to be applied to the original revenue over a 50-year period to obtain a present value is obviously historically inaccurate for the period 1928 to 1978. Nevertheless, some adjustment must be made.

Taking first a figure of 75 percent as the extent of the early (pre-1932) cutting on Unit One (as an approximation of the several conflicting and disparate figures offered by expert testimony) and subtracting what was offered by Mr. Beaty as a prudent cut level—65 percent—yield an approximate overcut on Unit One of 10 percent. Applying this to the total revenue received from the Unit One sale through 1932 (approximately $1,250,000) yields a sum of $125,000 that can be attributed to the excess volume of timber harvested by 1932. By 1978 the present value of that sum, assuming a time-value interest rate averaging 4.0 percent compounded daily for the 50-year periods, would have been $923.525. When this sum is subtracted

from the gross damages figure of $2,605,307, the net damages for the Unit One overcutting total $1,681,782.

To reach a final damages award for plaintiff, the damages for the Army fuel wood ($57,000), the Army sawmill timber $14,100), the agency sawmill timber ($33,647), and the 1924 fires ($10,400) must be added. The Government is liable to plaintiff for a sum total of $1,797,429 in damages for its mismanagement of forest resources.

CONCLUSION

It is found and concluded that (1) plaintiff failed to prove by a preponderance of evidence that defendant mismanaged the reservation's water resources and (2) that plaintiff is entitled to $5,242,429 for the Government's breaches of fiduciary duties in managing plaintiff's rangeland and forest resources. It is further found and concluded that plaintiff did not adduce evidence of any continuing wrong in respect of its water, rangeland, or forest resources.

Based on the foregoing,

IT IS ORDERED, as follows:

1. Plaintiff is awarded $5,242,429 for its claims for mismanagement of its resources.

2. If this amount is less than a timely offer of judgment for plaintiff's resource mismanagement claims that defendant served in writing in accordance with RUSCC 68, defendant shall file a copy of its offer by February 17, 1987, and a verified statement of costs incurred after defendant made the offer. If defendant made an offer with respect to all of plaintiff's claims in this docket, defendant shall not file its offer of judgment at this time.

3. If defendant makes the filing called for by ¶ 2, plaintiff shall show cause by March 2, 1987, why the award in ¶ 1 of this order shall not be reduced by the amount

of defendant's costs.

4. Judgment on these claims shall not be entered until a judgment can enter on all the claims comprehended by Docket No. 22- H.

APPENDIX 5

PART III. EXECUTIVE ORDERS RELATING TO RESERVES.

Walapai Reserve.

(See Hualapai.)

White Mountain or San Carlos Reserve.

[*Formerly called White Mountain or Camp Apache Reserve. Occupied by Arivaipa, Chilion, Chiricahua, Coyotero, Membreno, Mogollon, Mohave, Pinal, San Carlos, Tonto, and Yuma-Apache tribes; area 2,866 square miles; established by Executive orders, acts of February 20, 1893 (27 Stat., 469), and June 10, 1896 (29 Stat., 358).*]

ENGINEER'S OFFICE,
HEADQUARTERS, MILITARY DIVISION
OF THE PACIFIC,
San Francisco, Cal., January 31, 1870.

SIR: I respectfully forward the following description of the proposed Indian reservation in Arizona; the boundaries of the reservation to be as follows, as shown in red on the accompanying map: Starting at the point of intersection of the boundary between New Mexico and Arizona with the south edge of the Black Mesa, and following the southern edge of the Black Mesa, to a point due north of Sombrero or Plumoso Butte; then in the direction of the Picache Colorado to the crest of the Apache Mountains, following said crest down the Salt River to Pinal Creek, and then up the Pinal Creek to the top of the Pinal Mountains; then following the crest of the Pinal range, "the Cordilleras de la Gila," the "Almagra Mountains," and other mountains bordering the north bank of the Gila River, to the New Mexican boundary near Steeple Rock; then following said boundary north to its intersection with the south edge of the Black Mesa, the starting-point.

H.M. ROBERT,
Major Engineers.

General W.D. Whipple,
Adjutant-General Military Division of the Pacific.

DEPARTMENT OF THE INTERIOR,
BOARD OF INDIAN COMMISSIONERS,
Camp Apache, Arizona Territory, September 5, 1871.

SIR: As the White Mountain region has been set apart by the War Department as an Indian reservation, and there are several bands of peaceably disposed Apaches, who have for many years lived in this country, who can not be removed without much suffering to themselves, risk of war and expense to the Government, I have concluded to select the White Mountain Reservation, the boundaries of which were defined in letter of H.M. Robert, major of Engineers, dated Headquarters Military Division of the Pacific, San Francisco, Cal., January 31, 1870, as one of the Indian reservations upon which the Apache Indians of Arizona may be collected, fed, clothed, and otherwise provided for and protected, agreeable to the power conferred upon me at the suggestion of the President by the honorable Secretary of the Interior, under date July 21, 1871, and supplementary orders July 31, 1871, copies of which are herewith inclosed.

Agreeable to your wish that I should name the articles and amount of provisions to be issued, I would suggest that one pound of beef and one pound of corn per capita be issued with salt daily, and sugar and coffee occasionally.

Very respectfully, your obedient servant,

VINCENT COLYER, *Commissioner.*

Lieut. Col. JOHN GREEN,
First Cavalry U.S.A., Commanding
Camp Apache, Arizona Territory.

DEPARTMENT OF THE INTERIOR,

BOARD OF INDIAN COMMISSIONERS,
Washington, D.C., November 7, 1871.

SIR: Reservations for the roving Apache Indians of New Mexico and Arizona were selected under your instructions of 21st July, 1871, as follows:

For the Mimbres and Coyoteros at Tularosa Valley, in New Mexico. (See accompanying paper A.)

For the Coyotero and Chiloccos of Arizona, at Camp Apache, in White Mountains, Arizona. (See Appendix B.)

For the Arrivapis and Pinals, at Camp Grant, Arizona. (See Appendix C and accompanying map.)

For the Mohave Apaches, at Camp Verde, Arizona. (See Appendix D.)

A detailed description of the Camp Apache Reservation, which was established by Major-General Thomas, will be found on file in the War Department.

I also requested, with the advice of General Crook and the several post commanders, that temporary asylums, where the tontos, Hualapais, and Western band of Apache Mohaves might be protected and fed, should be established at Camp McDowell, Beal Spring, and Date Creek, until such times as the Indians collected there could be removed to the above reservations.

Very respectfully, etc.,

VINCENT COLYER.

Hon. C. DELANO,
Secretary of the Interior, Washington, D.C.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., November 7, 1871.

SIR: I have the honor to transmit herewith a copy of a communication addressed to this Department by the Hon. Vincent Colyer, one of the board of Indian peace commissioners who recently visited Arizona, wherein he states

his views in relation to the Apache Indians, and describes certain tracts of country in Arizona and New Mexico which, during his recent visit to said Indians, he has selected to be set apart as reservations for their use, as authorized to do by orders issued to him before visiting the Apaches.

I have the honor to recommend, in pursuance of the understanding arrived at in our conversation with the Secretary of War on the 6th instant, that the President issue an order authorizing said tracts of country described in Mr. Colyer's letter to be regarded as reservations for the settlement of Indians until it is otherwise ordered. * * *

I would further suggest that the War Department will, for the present, select some suitable and discreet officer of the Army to act as Indian agent for any of the reservations in Arizona which may be occupied by the Indians, under the order herein contemplated. Such agents will be superseded by persons hereafter appointed by this Department, at such times as the President may hereafter deem proper.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

THE PRESIDENT.

These recommendations were approved by the President as follows:

EXECUTIVE MANSION,
Washington, D.C., November 9, 1871.

Respectfully referred to the Secretary of War, who will take such action as may be necessary to carry out the recommendations of the Secretary of the Interior. (For boundary description, see above letter, January 31, 1870, A.M. Robert, Major Engineers.)

U.S. GRANT.

APPENDIX 6

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 22-D

THE SAN CARLOS APACHE TRIBE OF ARIZONA;

THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION;

THE WHITE MOUNTAIN APACHE TRIBE OR GROUP, THE SAN CARLOS APACHE TRIBE OR GROUP, THE CIBECUE APACHE TRIBE OR GROUP, THE SOUTHERN TONTO APACHE TRIBE OR GROUP, and the several bands of each of them, ex. rel., respectively Clarence Wesley (White Mountain), Jesse J. Stevens (San Carlos), Nelson Lupe, Sr. (Cibecue), and Ernest Cutter (Southern Tonto);

THE WESTERN APACHE and each group and band thereof, ex. rel. Clarence Wesley, Jess J. Stevens, Nelson Lupe, Sr., and Ernest Cutter,

Docket No. 229

THE NAVAJO TRIBE OF INDIANS,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Decided: June 27, 1969

FINDINGS OF FACT

1. *Capacity.* The San Carlos Apache Tribe of Arizona and the White Mountain Apache Tribe of the Fort Apache

Reservation, petitioners herein, are Indian tribes recognized by the Secretary of the Interior. The above petitioners have the capacity to bring this action under the Indian Claims

* * * * *

Chiricahua in language, economic practices, social organization and religious beliefs. The approximate boundaries between these two groups were the Rincon and Winchester Mountains. The boundary then extends northeasterly from the Winchester Mountains to the juncture of the Blue and San Francisco Rivers, and from this juncture northerly to the present town of Blue.

The Navajo were the Western Apache neighbors to the north and northeast. Relations between the two groups were intermittently friendly and hostile. At least by the late 1850's some Navajos were dispersing to the headwaters of the Little Colorado River and the north slopes of the White Mountains because of the winter campaign against them. Up to 1864 there was conflict between the Apaches and the Navajos in these areas. Their relationship became more friendly after 1864 while the Navajos were seeking refuge from the military. At least some of the claimed area between the Mogollon Rim and the Little Colorado River was used by the Navajo from time to time for hunting and gathering from at least the late 1850's into the 1870's.

10. *American Period.* By the Treaty of Guadalupe Hidalgo on February 2, 1848 (9 Stat. 922), following the war between Mexico and the United States, Mexico ceded to the United States an extensive area in the present-day American southwest, including most of the lands in Arizona which are involved in this case. The Treaty recited that "***a great part of the territories which, by the present treaty, are to be comprehended for the

* * * * *

> largely upon settlements of Sonora in the Republic of Mexico and travellers upon the California road from El Paso to San Diego have suffered from their marauding bands."

Steck recommended that an agent visit this tribe for information so that "security be given to travel upon this rout[e] and to setlers (sic) upon the Gadsen purchase . . ."

A military campaign against the Apache having been decided upon, troops under the command of Colonel Bonneville invaded the territory of the Western Apache in 1857. Pursuant to a subsequent suggestion of Agent Steck, a general council was held and peaceful relations were reestablished with the Western Apache. During the early years of contact with the Western Apache, officers and agents of the United States recommended that the Indians should be located in a permanent home to be set apart for them. No action, however was taken on these proposals.

A program looking toward the making of a treaty with the Western Apache and their establishment on a reservation was abandoned after the outbreak of the Civil War. In lieu thereof, the military commanders adopted a policy of attempting to subdue the Apaches by force, a policy which was to continue for a period of almost ten years.

By the end of the 1860's, the futility of attempting to subjugate the Indians by force became evident to the officers and they recommended that a reservation be set apart for the Western Apache within their aboriginal territory. The boundaries of a proposed reservation in the White Mountain region were set forth in a letter dated January 31, 1870 from Major H.M. Robert, Engineers Office, Military Division of the Pacific, to General W.D. Whipple, Adjutant General, Military Division of the Pacific. In 1871, President Grant directed Commissioner Vincent Colyer "to proceed to New Mexico and Arizona, and there take such measures as he deemed wisest to locate these

Apache Indians on suitable reservations, feed, clothe, and otherwise care for them***" By letter dated September 5, 1871, Commissioner Colyer "concluded to select the White Mountain Reservation, the boundaries of which were defined in letter of H.M. Robert, major of Engineers***". By the Executive Order of November 9, 1871, the White Mountain Indian Reservation was established. By Executive Order dated December 14, 1872, President Grant enlarged the said White Mountain Reservation by adding to it a described tract known as the "San Carlos division of the White Mountain Indian Reservation." By the latter date as a result of the pressure of the American military and the voluntary action of the Indians, most of the Western Apache were on reservations and by May 1873 they were almost all on reservations.

Subsequent to the establishment of the White Mountain Indian Reservation, including the San Carlos division, pursuant to the aforesaid Executive Orders of November 9, 1871 and December 14, 1872, the area of the reservation was successively curtailed and diminished by a series of Executive Orders, including those issued August 5, 1873, July 21, 1874, April 27, 1876, January 26, 1877, March 31, 1877, and December 22, 1902.

11. *Aboriginal Title Lands.* The Commission finds that on May 11 1873, and for a long time prior thereto, the Western Apache exclusively used and occupied in Indian fashion the following area in the present state of Arizona:

> Starting at the south end of Long Lake in T16N R11E (Gila and Salt River Meridian) thence southeasterly through the site of the present town of Heber to the site of the present town of Show-low; thence easterly to the present town of Vernon; thence southeasterly to Mallory Springs; thence southeasterly to the site of the present town of Blue; thence southerly following the course of the Blue River to its junction with the

> San Francisco River; thence southerly to the site of the present town of Guthrie; thence southwesterly to the highest peak of the Circle I Hills; thence southwesterly to Rincon Peak; thence northerly on a line following the ridge dividing the waters which flow into the San Pedro River from the waters which flow into the Santa Cruz River to the peak of Oracle; thence northeasterly to the site of the present town of Mammoth on the San Pedro River; thence northerly following that river to its junction with the Gila River; thence northerly to Signal Peak; thence northwesterly following the crest of the Pinal and Mazatzal Mountains to the juncture of the Verde River and the East Verde River; thence northeasterly to Turkey Mountain; thence northerly to the point of beginning at the south end of Long Lake.

The Commission also finds that on May 1, 1873, the Navajo Tribe, plaintiff in Docket 229, did not hold aboriginal title to any of the area enclosed within the above boundaries.

12. The Commission finds that May 1, 1873 marks the date on which the *United States took from the Western Apache Indians their Indian title to all of their aboriginal lands located outside of the boundaries of the reservation established by the Executive Orders of November 9, 1871 and December 14, 1872.* By December 14, 1872, the United States unequivocally manifested its intention to deprive the Western Apache Indians of their occupancy and use of their aboriginal lands outside of the reservations and by May 1, 1873 General Crook's campaign had succeeded in carrying out this intention and virtually all the Western Apache were on reservations.

August 5, 1873 marks the date of taking of the Western Apache Reservation lands placed in the public domain by the Executive Order of that date. Also, each of the dates

of July 21, 1874, April 27, 1876, January 26, 1877, March 31, 1877, and December 22, 1902, marks the taking date of an additional tract of Western Apache reservation lands, each of the particular tracts so taken being described in the respective Executive Orders issued on that date.

13. The Commission finds that the San Carlos Apache Tribe of Arizona and the White Mountain Apache Tribe of the Fort Apache Reservation, jointly, as representatives of the Western Apache and each group and band thereof as the same existed on May 1, 1873, are entitled to recover of and from the defendant the fair market value of their aboriginal title lands as of the taking dates set forth in Finding No. 12 herein, less such offsets, if any, to which the defendant may be entitled under the Indian Claims Commission Act (60 Stat. 1049).

/s/ Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

APPENDIX 7

EXECUTIVE ORDER DECEMBER 14, 1872

EXECUTIVE MANSION, *December 14, 1872.*

It is hereby ordered that the following tract of country be, and the same is hereby, with held from sale and set apart as a reservation for certain Apache Indians in the Territory of Arizona, to be known as the "Chiricahua Indian Reservation," viz:

Beginning at Dragoon Springs, near Dragoon Pass, and running thence northeasterly along the north base of the Chiricahua Mountains to a point on the summit of Peloncillo Mountains or Stevens Peak range; thence running southeasterly along said range through Stevens Peak to the boundary of New Mexico; thence running south to the boundary of Mexico; thence running westerly along said boundary 55 miles; thence running northerly, following substantially the western base of the Dragoon Mountains, to the place of beginning.

It is also hereby ordered that the reservation heretofore set apart for certain Apache Indians in the said Territory, known as the "Camp Grant Indian Reservation," be, and the same is hereby, restored to the public domain.

It is also ordered that the following tract of country be, and the same is hereby, withheld from sale and added to the White Mountain Indian Reservation in said Territory, which addition shall hereafter be known as the "San Carlos division of the White Mountain Indian Reservation," viz:

Commencing at the southeast corner of the White Mountain Reservation as now established, and running thence south to a line 15 miles south of and parallel to the Gila River; thence west along said line to a point due south of the southwest corner of the present White Mountain Reservation; thence north to the said southwest corner of the aforesaid White Mountain Reservation, and thence along the southern boundary of the same to the place of

beginning; the said addition to be known as the "San Carlos division of the White Mountain Reservation," which will make the entire boundary of the White Mountain Reserve as follows, viz:

Starting at the point of intersection of the boundary between New Mexico and Arizona with the south edge of the Black Mesa, and following the southern edge of the Black Mesa to a point due north of Sombrero or Plumoso Butte; thence due south to said Sombrero or Plumoso Butte; thence in the direction of the Piache Colorado to the crest of the Apache Mountains, following said crest down the Salt River to Pinal Creek to the top of the Pinal Mountains; thence due south to a point 15 miles south of the Gila River; thence east with a line parallel with and 15 miles south of the Gila River to the boundary of New Mexico; thence north along said boundary line to its intersection with the south edge of the Black Mesa, the place of beginning.

U.S. GRANT.

APPENDIX 8

ACTS OF FIFTY-FIFTH CONGRESS—FIRST SESSION, 1897.

Be it enacted, &c. * * * That a separate agency is hereby created to cover and have jurisdiction over all that portion of the White Mountain or San Carlos Reservation lying north of the Salt or Black River, to be known as the Fort Apache Reservation, with headquarters at Fort Apache, Arizona: * * *

APPENDIX 9

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

June 12, 1967

M-36762

Memorandum

To: Mr. Orren Beaty, Jr., Assistant of the Secretary

From: Associate Solicitor, Indian Affairs

Subject: Boundary question, Fort Apache Indian Reservation, Arizona

This is in reply to your request for a report on the above subject. Mr. Barry De Rose wrote you about it on December 30, 1966. Both Mr. De Rose and the Bureau on Indian Affairs allege that some 14,000 acres which should have been included in the Fort Apache Reservation (formerly White Mountain Indian Reservation) were omitted as a result of an erroneous survey made in 1887. More than 12,000 acres of the assertedly omitted land are now within the Sitgreaves National Forest. Mr. De Rose also contends that some lands now included in the Apache National Forest Should be in the reservation, and vice versa, with a difference of 679 acres due the reservation.

The White Mountain Indian Reservation, originally set apart in 1870 by the War Department as a reservation for the Apache Indians, was established by Executive Order of November 9, 1871. On December 14, 1872, a second Executive Order enlarged the reservation by adding land to the south, which was called the San Carlos Division. The Act of June 7, 1897 (30 Stat. 64), provided that the portion of the reservation north of the Salt or Black River be known thereafter as the Fort Apache Indian Reservation, and the southern part because the San Carlos Indian Reservation.

The original 1870 War Department description of the north boundary of the present Fort Apache Indian Reservation (letter of January 31, 1870, from H. M. Robert, Major, Engineers) was incorporated by reference into the 1871 Executive Order, which established the reservation. That description and that contained in the 1872 order define the northern reservation boundary as following the southern edge of the Black Mesa. (1 Kapp. 810-813).

The first survey of the north boundary was made by the Corps of Engineers in September-November 1883. A blueprint of this survey, by Lieutenant Bingham, is on file in the National Archives but field notes and instructions are not available. The first General land Office survey, made in 1887 by C. H. Wallace, was accepted in 1888. Mr. Wallace's instructions required him to follow "the trend of the * * * Black Mesa." He was to establish the northeast corner at the south edge of the Black Mesa, thence to "run in a westerly direction following the southern edge of the Black Mesa as near as practicable to a point due North of Sombrero or Plumoso-Butte at which point you will establish the Northwest corner of the Reservation establishing monuments and marking same at the end of each mile and half-mile." (Field Notes, Vol. 64, Arizona, pp. 193-197). The northwest corner was also to be established at a point on the south edge of the Black Mesa. He was also instructed to report all monuments of the previous survey. Correspondence regarding the Wallace survey and the field notes indicate that the country was exceedingly mountainous and broken along the whole line of the survey.

Mr. Wallace's field notes (Field Notes, Vol. 64, Arizona) indicate that he located monuments of the 1883 military survey and retraced the line which had been established four years earlier. He established the northeast corner on a ridge which he described as forming the divide between the Little Colorado and Salt Rivers. "Since this is the south edge of the Black Mesa," he writes, "I * * * build

a monument * * *." It is to be noted that the instructions had referred only to the Black Mesa, not to the divide.

The field notes also state that he established the northwest corner at the south edge of Black Mesa. During much of the survey he refers to following the south edge of the mesa, and his General Description states that the line follows the south edge of the Black Mesa as nearly as practicable and is substantially identical with the line established by the military authorities. (Field Notes, Vol. 64, Arizona, p. 222).

The Wallace survey—which retraced the original military survey of 1883—formed the basis of subsequent resurveys of the north boundary. The Black Mesa Forest Reserve was established by Presidential Proclamation of August 17, 1898 (30 Stat. 1782). Its southern boundary was described as being the north boundary of the Indian reservation. A general Land Office retracement of the 1887 boundary line was made by J. B. Wright in 1906. He was instructed to follow the line established by Wallace and to re-mark the monuments with "the marks WMIR on the side facing the Reservation, on the opposite side BMFR, for Black Mesa Forest Reserve * * *." The Black Mesa Forest Reserve now forms the Sitgreaves and Apache National Forests. (E.O. 868 and 876, July 1, 1908). His field notes (Field Notes, Vol. 105, Arizona) indicate compliance with these instructions and the survey was accepted by the General Land Office in 1909.

After the 95th-mile point, which he describes as high rolling mesa, Mr. Wright states that "at this point the line leaves the divide and cuts across points of ridges just south of the divide. Mountainous land, exceptionally difficult to survey." His General Description states that the boundary line follows in general the south edge of the Black Mesa, "near the divide between the waters of the Little Colorado and Salt Rivers," and that for the "last twenty miles the line leaves the 'Rim' and cuts across the points of the

sharp ridges pointing to the south. Part of this is almost impassable * * * [and] very difficult to survey." (Emphasis added).

Mr. De Rose indicates that the name Black Mesa has been changed to Mogollon Rim, that the rim is the divide, and that the survey fails to follow the divide after milepost 97.5, and in certain small areas bordering the Apache National Forest. The question presented is whether or not this constitutes gross error warranting resurvey.

The instructions to follow the southern edge of the Black Mesa "as near as practicable" allowed Mr. Wallace considerable leeway in his field operationsd. Authorizing the surveyor to make a determination of practicability sets a very subjective standard. (This is not to suggest, however, that the instructions were themselves erroneous.) What might appear practicable today—i.e., a close adherence to the south edge of the Black Mesa—may well have been impracticable at the time of the Wallace survey. It is particularly significant that Wallace followed closely the military survey of 1883, which interpreted the 1870 description of Major Robert.

In 1915 a retracement of that part of the north boundary within T. 11 N., R. 18 E., T. 10 N., Ps. 18, 19, 20 and 21 E., and T. 9 N., Rs. 21, 22, 24 and 25 E., was made by United States Surveyor Sidney E. Blout and accepted by the General Land Office. He was instructed to "make diligent and independent searches for evidences of the original survey." The purpose of the retracement was to close the lines of the public land surveys of the townships with the reservation boundary. (Instructions, Group 40, BLM Files, National Archives.) Mr. Blout's General Description (Field Notes. Vol. 144, Arizona, p. 114) states that:

> This line through townships 9, 10, and 11 N. Ranges 18, 19, 20, 21, and 22 E. follows the divide or watershed between the headwaters of

> the Slat and Little Colorado rivers, which is known and referred to through these thownship as the Mogollon Rim. Farther east in Ts. 9 N. Rs. 24 and 25 E. this rim continues to rise in elevation, terminating in the range of mountains known as the White Mountains.

The only disputed land within the Blout survey is a small area in T. 9 N., R. 25 E. The field notes for this part of the line make frequent references to following the "top of the divide," although the General Description would seem to indicate that the divide was not strictly followed through the entire township. This could in no way be considered contrary to instructions since they did not mention the divide.

As recently as 1935, 1936, and 1937, surveys were made of a number of individual townships along the disputed western portion of the north boundary, at the request of the Forest Service, as well as of T. 8 N., R. 26 E., which also contains a "disputed area" not in the Apache National Forest. The reservation boundary, as marked, was adopted and the plats were accepted by the General Land Office. (BLM files, Group 190, 191, 192, Arizona.)

In 1939, in response to a question raised about the accuracy of the boundary, the Assistant Commissioner of Indian Affairs concluded that the northern boundary line "is rather indefinite and would be difficult to locate on the ground and unless there is definite evidence that the southern edge of the Black Mesa is farther north than where the present line is surveyed, this Office feels it would be well to accept the line as it stands." He also pointed out that the boundary description and instructions refer to the Black Mesa, but not to the watershed (divide) as the natural boundary. (BIA File 10771-1927-304.2, National Archives, letter, December 19, 1939).

In view of this fact, upon which I have previously commented, I cannot concur with Mr. De Rose's conclusion

that "it was the intent that the entire north boundary of the Fort Apache Indian Reservation be accurately placed on the hydrologic divide between the Little Colorado and the Salt River Dranagen," The surveyor was under no obligation to follow the divide as such. He was instructed to follow the south edge of the mesa. The Geological Survey map of the Heber Quadrangle indicates that the mesa—there designated as Mogollon Rim—becomes broader west of the mile 97.5 boundary point, and that Rim Road, which coincides with the boundary from mile 46 to mile 97.5, traverses the top of the mesa from mile 97.5 on to the west. Rim Road is the boundary for which the Indians are contending. Admittedly the Wallace boundary line leaves the divide, as pointed out by Surveyor Wright in 1906. This does not, however, indicate that the surveyor contravened his instructions to follow the south edge of the mesa as closely an practicable. The south edge of the mesa would certainly not coincide with the crown of the mesa. It would necessarily be aline to the south of the highest elevation on the mesa. The line followed by Surveyor Wallace, in my opinion, fulfill the requirement set forth in the instructions. Though there may be areas in which the contours of the mountains might have been followed more closely, it would be difficult to say that the method used by Wallace does not follow the south edge of the mesa "as near as practicable" Moreover, if the northwest boundary corner were placed on Rim Road, it would be considerably north of Mogollon Rim, as indicated on the Woods Canyon Quadrangle map. Wallace's notes state that it was placed at the south edge of the mesa, and the Woods Canyon map so indicates.

The fact that the survey follows the divide for much of the distance has apparently fostered the belief that the divide was intended as the actual boundary. Early correspondance refers to the proposed reservation as the area bounded on the north and northeast by the Mogollon Mountains "or high mesa, separating the tributaries of the

Little Colorado from those of the Gila river * * *." (Letter of January 13, 1870, from General Ord to Adjutant General, Microcopy, 619, Roll 807, National Archives.) This does not indicate, however, that the actual divide was to form the boundary. On the contrary, the line was officially described as the southern edge of the mesa.

The procedure of following the divide for much of the survey was apparently necessitated by the mountainous terrain and for the most part seems compatible with following the southern edge of the mesa as nearly as practicable. In certain areas, however, this procedure appears to have erroneously "added" land to the reservation. See, for example, the McNary Quadrangle map, on which the boundary is considerably north of the southern edge of the mesa. This results in the "inclusion" within the reservation of substantial amounts of land which would have been excluded had the survey followed the exact sinuosities of the mesa's southern edge. Quite possibly, the reservation would lose more than it would gain if a minutely accurate survey were made today.

In view of the fact that the original (1883) survey was made by the military authorities, interpreting the original (1870) description of the boundaries; the scope given to Mr. Wallace in interpreting the instructions issued by the Surveyor General and Wallace's adherence to the 1883 line; and the fact that in the 1906 survey and subsequent surveys the General Land Office made no attempt to reinterpret those instructions or the original description, I am persuaded that the boundary has been accurately delineated and find no "gross error" requiring a resurvey.

Richmond E. Allen

APPENDIX 10

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 22-D and Docket No. 22-J

SAN CARLOS APACHE TRIBE OF INDIANS OF ARIZONA AND THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION, *et al.*
Plaintiffs

v.

THE UNITED STATES OF AMERICA
Defendant

Decided: September 12, 1972

FINDINGS OF FACT ON COMPROMISE SETTLEMENTS

This matter is now before the Commission for (1) approval of a compromise final settlement in Docket No. 22-D and the entry of a final judgment therein in the amount of $4,900,000, in favor of the plaintiffs, the San Carlos Apache Tribe of Arizona and the White Mountain Apache Tribe of the Fort Apache Indian Reservation, for and in behalf of the Western Apache; and (2) the approval of a compromise settlement in Docket No. 22-J and the entry of final judgment therein in the amount of $685,800, in favor of the plaintiffs, the Yavapai-Apache Indian Community, the Fort McDowell Mohave-Apache Community, the San Carlos Apache Tribe of Arizona and the White Mountain Apache Tribe of the Fort Apache Indian Reservation, for and in behalf of the Northern Tonto Indians.

In Docket No. 22-D, the Commission heretofore determined, on June 27, 1969, in 21 Ind. Cl. Comm. 189 (Find-

ings of Fact Nos. 1-13), that the Western Apache had aboriginal title to a tract of land (described in Finding of Fact No. 11), located in the present State of Arizona; and that the Western Apache aboriginal title to lands outside the White Mountain Apache Indian Reservation established by the Executive Orders of November 7, 1871, and December 14, 1872, was extinguished by the United States on May 1, 1873, without the payment of compensation. The Commission further determined that by the Executive Orders of August 5, 1873, July 21, 1874, April 27, 1876, January 26, 1877, March 31, 1877, and December 22, 1902, the United States successively extinguished as of said dates, without the payment of compensation, Indian title of the Western Apache Indians to tracts of land inside the said White Mountain Apache Indian Reservation. The Commission ordered that the case proceed to a determination of the acreages of the several tracts of land involved in the claim and the market value of the tracts as of the respective title extinguishment dates.

In Docket No. 22-J, the Commission has heretofore determined on June 27, 1969, in 21 Ind. Cl. Comm. 223 (Findings of Fact Nos. 1-19), that the Northern Tonto Indians had aboriginal title to a tract of land (described in Finding of Fact No. 17) in the present State of Arizona; and that on May 1, 1873, the United States extinguished, without payment of compensation, the Indian title to the lands outside the boundaries of the Camp Verde Indian Reservation; and that On April 2, 1875, the United States extinguished, without the payment of compensation, the Indian title to the lands inside the boundaries of the Camp Verde Reservation. The Commission ordered that the case proceed to a determination of the acreages of the tracts of land involved in the claim and the value of the tracts of the respective extinguishment dates.

* * * * *

34. The combined total vote at the five meetings was 999 in favor and 499 against (66-2/3 percent in favor and 33-

1/3 percent against) the approval of the settlement in Docket No. 22-D, and 896 in favor and 301 against (75 percent in favor and 25 percent against) the approval of the settlement in Docket No. 22-J, as follows:

Place of Meeting	Vote on 22-D		Vote on 22-J	
	Yes	No	Yes	No
Middle Verde	135	0	137	3
Fort McDowell	-	-	60	2
Cibecue	192	1	184	0
Whiteriver	10	498	3	296
San Carlos	662	0	512	0
Totals	999	499	896	301

35. It is thus seen that nearly all of the votes opposing the proposed settlements were cast at the Whiteriver meeting. At the Whiteriver meeting, a number of members of the White Mountain Apache Tribe expressed vigorous opposition to the proposed settlements. The substance of the opposition was that the proposed settlements contemplated and would result in the sale of reservation lands.

36. Following the meeting at Whiteriver, the members of the governing body of the White Mountain Apache Tribe scheduled a series of meetings to be held on the White Mountain Apache Reservation in eight districts which comprised the places of residence of the tribal members who had voted at the Whiteriver meeting. The purpose of these meetings was to provide further explanations of the proposed settlements, to clear up any misunderstandings respecting the proposed settlements and to take a new vote. A series of meetings was accordingly held in the eight districts during the period from August ?? through 22, 1972. The tallies of the votes at these eight meetings were 232 in favor and 30 against with respect to the settlement in Docket No. 22-D; and 227 in favor and 30 against with

respect to the settlement in Docket No. 22-J.* If the votes at these meetings held on the White Mountain Apache Indian Reservation are combined with the votes at the earlier meeting held on July 13, 1972, at Cibecue, on the White Mountain Apache Indian Reservation, the result is 424 in favor and 30 against with respect to the settlement in Docket No. 22-D; and 411 in favor and 30 against with respect to the settlement in Docket No. 22-J.

37. Representatives of the Bureau of Indian Affairs attended the various meetings of the tribes pertaining to the settlements and assembled information with respect thereto. On the basis of reports submitted by the representatives of the Bureau as well as information on the merits of the proposed settlements supplied to the Bureau by the attorneys for the tribes, the Department of the Interior approved the proposed settlements by letter dated September 6, 1972, addressed to the law firm of Weissbrodt & Weissbrodt, counsel to the tribes in Docket Nos. 22-D and 22-J, as follows:

> You submitted to this Bureau for approval (1) a proposed compromise to settle the claims in Docket No. 22-D for a net judgment of $4,900,000.00 in favor of the San Carlos Apache Tribe and the White Mountain Apache Tribe, for and on behalf of the Western Apache, and (2) a proposed compromise to settle the claims in Docket No. 22-J for a net final judgment of $685,800.00 in favor of the San Carlos Tribe, the White Mountain Apache Tribe, the Yavapai-Apache Indian Community, and the Fort McDowell Mohave-Apache Community, for and on behalf of the Northern Tonto.
>
> Your firm and associate attorneys, C.M. Wright, Jay H. Hoag and Rodney J. Edwards entered

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* *See* Commission's Ex. S-1.

into contracts with each of the above named tribes which were approved by

* * * * *

The members of the tribes were afforded full opportunity to ask questions, and all questions were fully answered. Also, the members of the tribes had the opportunity to comment and express their views on the proposed settlements. At the meetings held at Middle Verde and Fort McDowell, the vote of the members was taken by written ballot. At the meetings at Cibecue, Whiteriver and San Carlos, the count was taken by a showing of raised hands.

At each of the meetings, except the meeting at Whiteriver, a substantial majority of the members of the tribes voted to approve the settlements. At the meeting at Whiteriver, a substantial majority of the members attending the meeting voted to disapprove the settlements.

The votes at each of the meetings were tallied and the results of the tallies showed a combined total vote at the five meetings in the case of the proposed settlement of Docket No. 22-D, of 999 in favor and 499 against, (66-2/3 percent in favor and 33-1/3 percent against). The total vote in the case of the proposed settlement of Docket No. 22-J, was 896 in favor and 301 against (75 percent in favor and 25 percent against).

Nearly all of the votes against the settlements were cast at the Whiteriver meeting, which was one of the two meetings held on the reservation of the White Mountain Apache Tribe. At the Whiteriver meeting, about twelve members of the tribe expressed opposition to the settlements, including some who spoke in the Apache language

and expressed their view that if the members of the tribe voted to approve the settlements, they would be voting to sell reservation lands. Although effort was made to explain that no sale of reservation lands was involved in the settlements, the great majority voted against the settlements at this meeting.

After the Whiteriver meeting, the members of the governing body of the White Mountain Apache Tribe decided to schedule a new series of meetings of the members of the tribe in the various districts of the reservation which had been represented at the Whiteriver meeting. The purpose of these meetings was to provide further explanations of the proposed settlements, to clear up any misunderstandings respecting the proposed settlements and to arrange for new votes in these districts. A series of meetings was then scheduled and held in eight districts which had been represented at the earlier meeting at Whiteriver. The combined vote at these eight meetings was 232 in favor of approval and 30 against it with respect to the proposed settlement of Docket No. 22-D; and 227 in favor and 30 against with respect to the proposed settlement of Docket No. 22-J.

* * * * *

Mr. Fred Banashley, chairman, and Mr. Nelson Lupe, Sr., and Mr. Wesley Bonito, council members, of the governing body of the White Mountain Apache Tribe, testified with respect to the general membership meetings held on the White Mountain Apache Reservation at Cibecue on July 13, 19792, and at Whiteriver on July 14, 1972, and with respect to the meeting of the governing body of the White Mountain Apache Tribe held on August 7, 1972. These witnesses also expressed their opinion as to the basis for the misunderstanding which caused the unfavorable

votes on the settlements at the Whiteriver meeting. It was explained that the misunderstanding was primarily attributable to the erroneous view that the approval of the settlements would result in the sale of the tribe's reservation lands. These witnesses also testified concerning the subsequent series of meetings held during August 1972, in eight districts of the reservation of the White Mountain Apache Tribe which had earlier been represented at the Whiteriver meeting and as to the votes cast in these district meetings approving the settlements by a substantial majority.

39. Considering all of the circumstances, the record of litigation to date, the testimony of the witnesses who have appeared before us in this settlement proceeding, and the representations of counsel for the parties, the Commission finds that the members of the tribes were given full notice in advance of the series of five meetings held during the period of July 8-15, 1972; that the members had a full opportunity to attend said meetings and express their views on the proposed offers to compromise and settle the claims in Docket Nos. 22-D and 22-J; that the proposed settlements in Docket No. 22-D and Docket No. 22-J were approved by a substantial majority of the combined votes of the members of the tribes present at these meetings; that the misapprehension as to the terms and effect of the proposed settlements at one of the meetings, namely, the meeting at Whiteriver, Arizona, was cleared up (see finding 36, *supra*); that each of the duly authorized governing bodies of the tribe has, respectively, voted unanimously to accept the proposed settlements and has, respectively, approved the stipulations for entry of final judgment.

40. The Commission finds, based upon the testimony of the witnesses, the record at all stages of the litigation, the representations of counsel, and all other pertinent factors before us, that the proposed compromise settlement in Docket No. 22-D and the proposed compromise settlement in Docket No. 22-J are fair to the parties and have

been freely entered into by them and duly approved by the Deputy Commissioner of Indian Affairs.

The Commission hereby approves the proposed compromise and settlement in Docket No. 22-D and will enter a final judgment in Docket No. 22-D in favor of the plaintiffs, the San Carlos Apache Tribe of Arizona and the White Mountain Apache Tribe of the Fort Apache Indian Reservation, in the amount of $4,900,000, for and on behalf of the Western Apache, subject to the terms and provisions set forth in the Stipulation for Entry of Final Judgment.

The Commission hereby also approves the proposed compromise and settlement and will enter a final judgment in Docket No. 22-J in favor o the plaintiffs, the Yavapai-Apache Indian Community, the Fort McDowell Mohave-Apache Community, the San Carlos Apache Tribe of Arizona, and the White Mountain Apache Tribe of the Fort Apache Indian Reservation, in the amount of $685,800, for and in behalf of the Northern Tonto Indians, subject to the terms and provisions set forth in the Stipulation for Entry of Final Judgment.

/s/ Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

APPENDIX 11

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

88-1251

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

FILED

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MAY 10 1988

FRANCIS X. GINDHART
CLERK

ON MOTION

Before NIES, ARCHER and MICHEL, *Circuit Judges.*

ARCHER, Circuit Judge.

The United States moves to dismiss the appeal of the White Mountain Apache Tribe of Arizona (Tribe) on the ground that the Claims Court's December 15, 1987 order is not a final, appealable order. The Tribe opposes this motion. The United States moves for leave to file a reply.

BACKGROUND

In 1972, the Claims Court entered a stipulated consent judgment as compensation to the Tribe for the United States' past extinguishment of Indian title to certain lands, Docket 22-D. Presently pending before the Claims Court, Docket 22-H, is a suit for compensation to the Tribe based on mismanagement of the water, rangeland and timber of Tribe reservation lands. On February 6, 1987, the Claims Court entered an interlocutory decision in that case, *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614 (Cl. Ct. 1987). The decision states that final judgment would not be entered until a judgment on al of the claims in Docket 22-H could be entered. *Mountain Apache Tribe*, 11 Cl. Ct. at 682. No party has noticed an appeal from that order.

On June 19, 1987, the Tribe filed a two-pronged motion in Docket 22-H. The motion requested the Claims Court (1) to construe and interpret the 1972 consent judgment so that 16,000 additional acres of land be included within the reservation and thus be part of the mismanagement claim case or (2) to modify the 1972 consent judgment pursuant to Claims Court Rule 60(b) to include the disputed acres within the reservation and thus be part of the mismanagement case. The grounds for the motion were two: first, that an 1887 survey (Wallace Survey) was grossly erroneous and improperly excluded 16,000 acres of land from the reservation and, second, that a certain government attorney practiced fraud by his alleged participation in the 1972 settlement and simultaneous failure to inform the Tribe that he knew that the Wallace Survey was in error.

On November 15, 1987, the Claims Court denied the motion stating that the issue concerning the disputed acres had specifically been excluded from trial in Docket 22-H. The subject appeal is from the November 15, 1987, order. The government argues that the order is not final or

appealable because Tribe will have a right to present its argument that the Claims Court's ruling was in error when or if it files an appeal after final judgment in Docket 22-H. In response, the Tribe argues that the order is appealable under the *Cohen* rule. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

DISCUSSION

It is undisputed that there is not a final judgment in Docket 22-H. Thus, any order issued therein is not appealable unless it falls under some exception to the finality rule. The Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve a litigation is nonetheless appealable under the *Cohen* exception to the finality rule, *viz.*, (1) does the order conclusively determine the disputed question, (2) does the order resolve an important issue completely separate from the merits of the action, and (3) is the order effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 56 U.S.L.W. 4243, 4245 (March 22, 1988), *quoting Cooper & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The Claims Court order at issue clearly does not meet that test. The issue that the Tribe seeks to present on appeal will be fully reviewable in the course of any final appeal in Docket 22-H.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' motion to dismiss is granted.

(2) The United States' motion for leave to file a reply is granted.

FOR THE COURT

May 10, 1988 — /s/ Glenn L. Archer, Jr.

Date — Circuit Judge

cc: Martin W. Matzen, Esq.
William H. Veeder, Esq.

ISSUED AS A MANDATE: MAY 10 1988

APPENDIX 12

REPORT OF INVESTIGATIONS OF THE PROCESSES OF ACCELERATED EROSION AND THE EFFECTS ON THE LAND, WATER, AND THE RANGE RESOURCES BASE OF THE FORT APACHE INDIAN RESERVATION, ARIZONA

Prepared for: THE WHITE MOUNTAIN APACHE TRIBE
P.O. Box 708
Whiteriver, Arizona 85941

Prepared by: Michael B. Kaczmarek
Chief Geologist and Earth Scientist
MORRISON-MAIERLE, INC.
Consulting Engineers and Earth Scientists
910 Helena Avenue
Helena, Montana 59601

JANUARY 17, 1986

* * * * *

from 1922 to 1928 under the direct promotion and supervision of the reservation Superintendent at the Fort Apache Agency.

8. As a result of the non-Indian grazing permits issued by the Department of Interior and the Commissioner of Indian Affairs from 1902 to 1927, the stocking rates on the reservation lands greatly exceeded the potential carrying capacity of the range, notwithstanding the presence of any Indian owned cattle introduced by the agency Superintendent during the same time period.

9. The consequence of overstocking and overgrazing by non-Indian livestock during the period 1902 to 1927 was the initiation of widespread accelerated erosion occuring in essentially all of the perennial streams and tributary ephemeral water courses on the reservation.

10. Aerial photographs of the reservation taken in 1935 (Exhibit A-4) show that major arroyo downcutting and perennial stream channel downcutting and enlargement in 1935 had reached essentially the same extent and magnitude as is present today, i.e., the majority of accelerated erosion had occured prior to 1935, principally as the result of overstocking of the reservation with non-Indian cattle under grazing permits issued by the Department of Interior. Indian-owned cattle introduced by the Department of Interior during the same time period did not exceed the carrying capacity of the range.

11. Overgrazing of the range land by non-Indian livestock was the principal cause of accelerated erosion.

12. Field investigations show that accelerated erosion has proceeded to the extent that the productivity of the land is diminished including approximately 427,811 acres of land where the effects of the accelerated erosion have caused irreparable damage.

* * * * *

ingly, the effects of overgrazing as observed across the entire Fort Apache Indian Reservation are likewise irreversible without some type of major reclamation effort going far beyond merely retiring the range from grazing pressure.

2.6. Current Status of Erosion

The investigations of the processes of accelerated erosion as reported in the preceding narative and data demonstrate conclusively that *accelerated erosion has continued on the Fort Apache Indian Reservation from at least as early as 1912 to the present and is continuing to damage reservation land, waster, and range resources at an unabated rate.* Examination of the 1935 aerial photographs of the reservation reveals that massive arroyo downcutting by 1935 was essentially as extensive as it is today although

enlargement of the incised arroyos continues at present at a less accelerated rate by means of lateral erosion of perennial streams, lateral slumping of arroyo walls, and headward erosion of arroyo scarps. More significantly, *soil erosion on the range land surfaces is continuing at present at a rate at least equal to historic accelerated erosion and probably even more rapidly due to the continuing degradation of the vegetal cover of the reservation.* Consequently, the damages to the reservation resources base have occurred continuously since the beginning of non-Indian livestock grazing, as is manifest in the historic record as early as 1905 when graze for the agency livestock at Whiteriver was not available, *and the damages to the reservation resources are continuing at a rate equal or in excess to the historic rates of resources degradation following the initial surge of accelerated erosion occurring between 1912 and 1925.*

APPENDIX 13

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

91-5060

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ON MOTION

Before RICH, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge* and PLAGER, *Circuit Judge*.

PLAGER, *Circuit Judge*.

ORDER

The United States moves to dismiss the appeal of the White Mountain Apache Tribe of Arizona (Tribe). The Tribe moves for leave to file, out of time, an opposition to the motion to dismiss with opposition attached.

By way of background, in 1972 the Claims Court entered a stipulated consent judgment concerning Indian title to certain lands. The present Claims Court case is a suit for compensation based on mismanagement of those tribal lands. In an earlier appeal, no. 88-1251, the Tribe sought judicial review of an order of the Claims Court denying the Tribe's motion to construe the 1972 consent judgment to include additional lands in its present mismanagement suit. The United States moved to dismiss that appeal. On May 10, 1988, this court granted the United States' mo-

tion, rejecting the Tribe's argument that the order was appealable pursuant to the *Cohen** doctrine. We stated:

> the issue that the Tribe seeks to present on appeal with be fully reviewable in the course of any final appeal in Docket 22-H.

Subsequently, the Tribe moved in the Claims Court for leave to offer evidence or to make a proffer concerning the disputed lands. On November 27, 1990, the Claims Court denied those motions.

On January 14, 1991, the Tribe moved to "enforce the mandate" contained in our May 10, 1988 order, asserting that the Claims Court had to allow the presentation of evidenced supporting its claims. On February 8, 1991, the Claims Court denied the motion stating:

> [T]he subject of the instant motion has been subject to multiple rulings in the past after full briefings and consideration by the court. The court's rulings on point are a matter of record. No useful purpose was served by plaintiffs filing its most recent motion. The motion was denied previously for reasons fully explained in the orders of the court.
>
> Plaintiff is on notice that future motions of this nature will not be tolerated. Should plaintiff file another frivolous, repetitive motion, plaintiff will be required to pay for defendant's attorney time in responding thereto. Although the court's consideration of such filings is gratis, plaintiff's opponent should not be required to respond without reimbursement of attorney's fees.

The November 27, 1990 and February 8, 1991 orders are not appealable orders. As we stated before, the Tribe may seek review of the propriety of the denial of its mo-

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Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

tions on appeal after final judgment. *Cf., Chapman v. Manbeck*, no. 90-1446, slip op. at 4 (Fed. Cir. Apr. 16, 1991).

Accordingly,

IT IS ORDERED THAT:

(1) The Tribe's motion for leave to file its opposition out of time is granted.

(2) Based on review of the United State's motion and the Tribe's opposition, the United States' motion to dismiss is granted.

FOR THE COURT

JUN 3 1991
Date

/s/ S. Jay Plager
S. Jay Plager
Circuit Judge

cc: William H. Veeder, Esq.
Elizabeth A. Peterson, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JUN 3 1991
FRANCIS X. GINDHART
CLERK

APPENDIX 14

IN THE UNITED STATES CLAIMS COURT

No. 22-H

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

(Filed Feb. 8, 1991)

ORDER

On January 14, 1991, plaintiff filed its Motion To Enforce Mandate of the Court of Appeals with Memorandum in Support. Defendant has responded, plaintiff has replied, and argument is deemed unnecessary.

As defendant points out in its opposition, the subject of the instant motion has been subject to multiple rulings in the past after full briefing and consideration by this court. The court's rulings on point are a matter of record. No useful purpose was served by plaintiff's filing its most recent motion. The motion was denied previously for reasons fully explained in the orders of this court.

Plaintiff is on notice that future motions of this nature will not be tolerated. Should plaintiff file another frivolous, repetitive motion, plaintiff will be required to pay for defendant's attorney time in responding thereto. Although the court's consideration of such filings is gratis, plaintiff's

opponent should not be required to respond without reimbursement for attorneys' fees.

/s/ Christine Cook Nettesheim
Christine Cook Nettesheim
Judge

APPENDIX 15

UNITED STATES CLAIMS COURT

No. 22-H

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

July 14, 1992

Indian tribe brought action against government for damages and for accounting pursuant to Indian Claims Commission Act. The Claims Court, Nettesheim, J., held that: (1) General Services Administration (GSA) report, taken together with all supporting documentation constituted adequate accounting of expenditures from Indian trust fund; (2) government expenditures from Indian trust accounts to construct roads and bridges on reservation would be disallowed to extent they were intended to benefit tourists and other individuals unconnected with reservation; and (3) government expenditures from Individual Indian Monies (IIM) trust account were prima facie proper if supported by tribal resolutions.

Judgment accordingly.

* * *

control over its funds. The volume of tribal resolutions authorizing expenditures is sufficient to establish that the tribe itself had control of IIM funds. No evidence surfaced

that any of the superintendents coerced the Tribal Council so as to cause the Council to misspend the tribe's funds. The power that the superintendents exercised was merely the power to veto spending, not the power to spend. The same holds true for the power exercised by the Secretary of the Interior, who was required to approve or disapprove tribal disbursements following recommendations by the Tribal Council and the BIA superintendent.

At trial it was established that defendant was unable to provide documentation for more than $8 million of vouchers for IIM disbursements. This presents the court with a dilemma. Defendant candidly has admitted that more than $8 million of vouchers are missing. With the deductions made already for double counting from the Receipt Fund transfers and for the individual Stock Association Fund moneys, the amount of the missing vouchers, more than $8 million, exceeds $6,198,956.95, the amount that the court has found is at issue following the Fort Apache Stock Association and Disbursement/Receipt Fund deductions. Despite plaintiff's failure of proof on the IIM claim, the first responsibility in rendering an adequate accounting rests with the trustee, the Government. Although plaintiff forfeited its right to a supplemental accounting, the documentation provided by defendant is inadequate because it cannot account for $8 million in missing vouchers. Because defendant did not establish at trial whether and what portion of the missing vouchers would be found in the moneys disbursed from the Receipt Fund to the Disbursing Fund, the court finds that the Government has failed in its duty as trustee to provide documentation that would allow plaintiff to readily ascertain if the trust had been faithfully carried out. Plaintiff therefore takes $6,198,956.95 on its IIM claim.

CONCLUSION

Accordingly, based on the foregoing, plaintiff is entitled to judgment on all of its resource mismanagement and

accounting claims in the total amount of $14,386,470.32, as follows:

1. Per the February 6, 1987 opinion on plaintiff's claim for resource mismanagement, *White Mountain Apache Tribe*, 11 Cl.Ct. at 681, $5,391,429.00.[27]

2. Per the February 20, 1992 opinion on three of plaintiff's accounting claims, *White Mountain Apache Tribe*, 25 Cl.Ct. at 342, $892,496.00.

3. On plaintiff's claims relating to IMPL disbursements, $1,903,588.37, with interest consistent with the May 9, 1990 opinion, *White Mountain Apache Tribe*, 20 Cl.Ct. at 377-78.

4. On plaintiff's claims relating to IIM disbursements, $6,198,956.95.

The Clerk of the Court shall enter judgment accordingly.

IT IS SO ORDERED.

The attention of counsel for plaintiff is directed to General Order No. 4.

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[27] The court awarded $5,424,429.00; $33,000.00 was deducted to avoid duplicate recovery by the

APPENDIX 16

OPENING BRIEF OF PLAINTIFF-APPELLANT WHITE MOUNTAIN APACHE TRIBE

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 93-5018

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff-Appellant

v.

THE UNITED STATES,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES CLAIMS COURT HONORABLE CHRISTINE COOK NETTESHEIM, JUDGE

William H. Veeder
818 18th Street, N.W. #920
Washington, DC 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe

* * *

D. Trustee Deprived Tribe of 16,000 Acres of Reservation Land

Provision is made in the November 9, 1871 Executive Order creating the White Mountain Apache Indian Reservation, that the northern boundary of the Reservation is

the south edge of the Black Mesa.[74] There was real merit in the selection of the south edge of Black Mesa as the northern boundary of Tribe's Reservation by reason of the fact that it is a well known natural monument. Due to the Trustee's erroneous survey, which failed to follow "the south edge of the Black Mesa." 16,000 acres from Tribe's Reservation were excluded from the Reservation, 12,000 of which were highly valuable ponderosa pine forests.[75] Irrespective of that gross error, the Trustee approved the erroneous survey.[76] On June 27, 1969, the Indian Claims Commission found as a fact that:

* * *

> . . . the United States took from the Western Apache Indians their Indian title to all of their aboriginal lands located *outside of the boundaries of the reservation established by the Executive Orders of November 9, 1871 and December 14, 1872.*[77]

That Commission likewise adjudge, declared, and decreed that the Tribe is ". . . entitled to recover . . . the fair market value of their aboriginal lands."[78]

The Tribe sharply rejected a proposed settlement on the grounds that it ". . . contemplated and would result in the sale of reservation lands."[79] Subsequently, the Trustee and the then Claims Attorney—contrary to fact—convinced the Tribe—in error—that there would be no loss of land and

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[74] Appendix 4, p. 10, 11.

[75] Appendix 31, p. 174-179, Affidavit of Elmer Clark.

[76] Appendix 32, p. 180-181, Memorandum Opinion of Richmond F. Allen.

[77] Appendix 1, p. 5, Selected pages from 21 Ind.Cl.Comm. 198, (1909).

[78] *Ibid.*, p. 6.

[79] Appendix 33, p. 184, selected pages from 28 Ind.Cl.Comm. 399, 410, September 12, 1972, Findings of Fact on Compromise Settlement, Finding 35.

the Tribe then approved the settlement[80] with the attendant loss of the 16,000 acres.

On November 2, 1987, Tribe filed with the court below its Supplemental Motion[81] seeking to have set aside the September 12, 1972 Compromise Settlement. The Court below permitted the Trustee to respond[82] to Tribe's motion and thereafter on December 15, 1987, denied Tribe's motion, adopting verbatim the Trustee's response, declaring:

> This brief [Trustee's] accurately and fully addresses plaintiff's argument. . . . It is the court's view that a judicially crafted order would not add to or differ from any of the points made in defendant's November 16 brief. Accordingly, the court adopts as the basis for its ruling the reasons set forth in defendant's brief. . . . Plaintiff's motion is denied except insofar as plaintiff has been allowed to file its affidavit and related exhibits.[83]

Tribe appealed to this Court from the December 15, 1987 Order of the court below, seeking to be heard by this Court in regard to the loss of the 16,000 acres and the Trustee's income from that land. Resistance to Tribe's appeal was interposed by the Trustee on the grounds that the December 15, 1987 Order lacked finality. This Court agreed, declaring, nevertheless, "[t]he issue that the Tribe seeks to present on appeal will be fully reviewable in the course of any final appeal in Docket 22-H."[84] From the final disposition by the court below of Docket 22-H the Tribe again petitions this Court, to be heard respecting the 16,000 acres.

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[80] *Ibid.*, p. 186-188.

[81] Appendix 34, p. 189-198.

[82] Appendix 35, p. 199-208.

[83] Appendix 36, p. 209-210, Order of December 15, 1987.

[84] Appendix 37, p. 211, Court of Appeals Order dated May 10, 1988.

* * *

(5) This Court is petitioned by the Tribe to enter an order requiring the court below to afford the Tribe a full and fair hearing respecting 16,000 acres of land excluded from Tribe's Reservation by the Trustee's erroneous survey and to award damages to the Tribe for the great benefits that have accrued to the Trustee for the harvest of at least three cuttings of highly valuable ponderosa pines and for other income received by the Trustee in administering those lands.[201]

* * *

C. Damages to Tribe's Reservation from Continuing Accelerated Erosion

The court below has found that the Trustee was liable for the overgrazing on the Tribe's Reservation and likewise liable for the erosion and infestation of junipers attendant upon that overgrazing.[165] Tribe's Soil Scientist Kaczmarek testified in regard to the damages sustained by the Tribe due to accelerated erosion that has literally washed away a substantial portion of Tribe's Reservation[166] and is continuing the destruction of Tribe's Reservation. Referring to Tribe's Report, "Summary of Damages . . . ," Mr. Kaczmarek testified in regard to the total costs of restoration and the various factors that he considered in arriving at the total cost of rehabilitating Tribe's severely damaged Reservation, which is $176,282,800, with administrative costs increasing the total expense to $234,632,500.[167] The

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[201] Supra., p. 18, *et seq.*

[165] *Supra.*, p. 12-15.

[166] Appendix 16, p. 66-92, with graphic displays Ex. A-429, p. 69, Ex. A-429-A, p. 7; Appendix 23, p. 120-121, stating ". . . soil erosion . . . is continuing at present rate at least equal to accelerated erosion."

[167] Appendix 16, p. 85-91, ln. 13-25; p. 91-92, (1) The test plots and I just referred to $3,200,000; (2) A program of brush control to remove juniper from range land 18,975,500; (3) Seeding of . . . range land . . .

court below denied any damages for the accelerated erosion irrespective of its specific ruling that the Trustee "... must be held liable for the accelerated erosion that resulted."[168]

* * *

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

* * *

Plaintiff-Appellant Tribe respectfully petitions this Court to award the relief prayed for above.

Respectfully submitted,

/s/ William H. Veeder
William H. Veeder
818 18th Street, N.W. #920
Washington, DC 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe

Dated: January 12, 1993

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zero to 10 percent slope range 10,250,000; (4) Seeding ... Range land zero to 10 percent; (5) Aerial seeding, which would be applied to intermediate terrain where reseeding equipment cannot be operated $137,051,000; Subtotal: $176,282,800.

[168] Addendum I, p. 46.

APPENDIX 17

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 93-5018

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES CLAIMS COURT (HONORABLE CHRISTINE COOK NETTESHEIM)

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* * *

III
THE TRIBE IS BARRED BY *RES JUDICATA* FROM CHALLENGING THE 1972 CONSENT JUDGMENT OF THE INDIAN CLAIMS COMMISSION

In its statement of the case, Br. 18-20, the Tribe refers to its allegation that the United States deprived the Tribe 16,000 acres by an erroneous survey of the northern boundary of the Tribe's reservation. In its brief, the Tribe only discusses its attempted appeal of a non-final order of the Claims Court to this Court in *White Mountain Apache Tribe v. United States*, Fed. Cir. No. 88-1251 (May 10, 1988), as if by reference the Tribe could resurrect that appeal. Because the Tribe has presented no argument on the issue, this Court should deem the issue waived on

appeal.[9] Nevertheless, we will briefly recapitulate the Tribe's allegations and the show that the Claims Court correctly rejected the Tribe's effort to reopen Docket No. 22-D.

In 1972, the Tribe settled its land claims with the United States in Indian Claims Commission Docket No. 22-D. *San Carlos Apache Tribe v. United States*, 28 Ind. Cl. Comm'n 399 (1972). The Claims Commission had previously held that the United States was liable to the Tribe for the taking of its aboriginal lands lying outside the boundaries of the reservation established for the Tribe. *San Carlos Apache Tribe of Indians v. United States*, 21 Ind. Cl. Comm'n 189 (1969). The 1972 settlement contained the following provision:

> Entry of Final Judgment in said amount [$4.9 million] shall finally dispose of all rights, claims or demands which the plaintiffs have asserted or *could have asserted* with respect to the subject matter of the suit in Docket No. 22-D, and plaintiffs shall be barred thereby from asserting any such rights, claims or demands against defendant in any other or future action.

San Carlos Apache Tribe v. United States, 28 Ind. Cl. Comm'n 399, 402 (1972). The Commission found that the judgment was fair to the Tribe and that the Tribe entered into it freely. *Id.* at 419.

The Tribe cannot claim that the judgment in 22-D does not bar its claim. The judgment in 22-D specifically bars the Tribe from pursuing any claim that the Tribe "could have asserted" in that proceeding. Even if, as the Tribe suggests (Br. 18-20), that it did not assert that the United States had deprived it of 16,000 acres of land through an

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[9] The Tribe also never refers to its 1991 attempt to relitigate the issue and its interlocutory appeal to this Court of that issue. This Court should deem waived any different issue raised in those pleadings.

erroneous survey, it certainly could have done so. That claim is now barred by the terms of the judgment itself. Moreover, the claim is also barred by Section 22(a) of the Indian Claims Commission Act, which provides that the "payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." 25 U.S.C. 70u(a) (1976 ed.) Indeed, one of the " 'chief purpose[s] of the [Act was] to dispose of the Indian claims problem with finality.' " *United States v. Dann*, 470 U.S. at 45 (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)).

In addition, the Tribe is barred from disputing the *res judicata* effect of the judgment in 22-D. The Tribe has already argued this point in another court, which held the Tribe's claim to be barred. *White Mountain Apache Tribe v. Clark*, 604 F. Supp. 185, 187-89 (D. Ariz. 1984). The district court held there that "[t]he Indian Claims Commission did rule that there had been a taking of all lands lying outside the boundary of the reservation. That boundary *is* the Wallace Survey boundary." *Id.* at 188 (emphasis in original). The Ninth Circuit specifically affirmed this holding in *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 926 (9th Cir.), cert. denied, 479 U.S. 1006 (1986). This Court should not permit the Tribe to relitigate whether the judgment in 22-D bars their claim that the government has deprived the Tribe of 16,000 acres.

To excape the preclusive effect of the judgment in 22-D, the Tribe moved to alter the 1972 consent judgment pursuant to U.S. Cl. Ct. R. 60(b) (which is similar to Fed. R. Civ. P. 60(b)). App. 189. In support of this motion, the Tribe claimed that the former claims attorneys somehow misled the Tribe as to the effect of the 1972 judgment and that the Claims Court should therefore modify the 1972 judgment because the Tribe was a victim of fraud. In response, the United States argued that the motion was untimely, because the current claims attorney had known

about the alleged "fraud" since 1983, but did not move for relief from the judgment until 1986. App. 204. In addition, the government argued that the Tribe had not, in its motion, met its burden of proof with respect to fraud, *i.e.*, by clear and convincing evidence. App. 205-06. The Claims Court adopted this memorandum as the basis for its decision to deny the Rule 60(b) motion. App. 209.

The Claims Court did not abuse its discretion in denying the Tribe's Rule 60(b) motion. The Tribe had ample time to present its alleged fraud to the court, but did not. Moreover, the Tribe bases its "proof" of fraud on nothing more than speculation, conjecture, coincidence, and hypothesizing. See App. 205-06. This cannot be the clear and convincing evidence necessary to prove fraud. Under these circumstances, there is no just reason to relieve the Tribe of a judgment it entered into freely and to deny the United States its end of the bargain.

No. 93-1127

In the Supreme Court of the United States

OCTOBER TERM, 1993

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to reopen a fifteen-year-old judgment that extinguished the petitioner Indian Tribe's aboriginal title to land lying outside of the boundaries of its Reservation.

2. Whether the trial court erred in determining the amount of damages owed to petitioner to compensate it for the erosion of rangelands on its Reservation.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 5 F.3d 1506 (Table). The opinions of the Court of Federal Claims (see note 2, *infra*) are reported at 11 Cl. Ct. 614 (*reprinted* in part at Pet. App. 15a-66a), and 26 Cl. Ct. 446 (*reprinted* in part at Pet. App. 106a-108a). The other relevant orders of the Court of Federal Claims (Pet. App. 5a-6a, 104a-105a) are unreported.[1]

[1] Other reported decisions of the Claims Court appear at 4 Cl. Ct. 575 (1984); 4 Cl. Ct. 586 (1984); 5 Cl. Ct. 288 (1984); 6 Cl. Ct. 575 (1984), rev'd mem., 776 F.2d 1063 (Fed. Cir. 1985) (Table); 8 Cl. Ct. 677 (1985); 9 Cl. Ct. 1 (1985); 9 Cl. Ct. 32 (1985); 9 Cl. Ct. 158

JURISDICTION

The court of appeals entered its judgment on August 17, 1993. A petition for rehearing was denied on September 13, 1993. Pet. App. 4a. On December 1, 1993, the Chief Justice extended the time, to and including January 11, 1994, in which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the appeal from a final judgment of the accounting phase of a case filed under the jurisdiction of the Indian Claims Commission and its successors.[2] This phase of the litigation involved various resource mismanagement claims that petitioner brought against the United States for alleged wrongs that arose before 1946. The trial court awarded petitioner slightly more than $14 million in damages for range and timber mismanagement and for improper and unaccounted for disbursements of tribal funds. Pet. App. 108a. With interest, that award now totals approximately $19 million, and interest continues to accrue on the portion of the

(1985); 10 Cl. Ct. 115 (1986); 20 Cl. Ct. 371 (1990); and 25 Cl. Ct. 333 (1992).

[2] Petitioner commenced this action before the Indian Claims Commission under Section 2 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1050. When Congress disestablished the Claims Commission, it transferred all of the Claims Commission's cases to the United States Court of Claims. Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990. The United States Claims Court received jurisdiction of this case under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105, 96 Stat. 26-27. That court is now called the United States Court of Federal Claims. See *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2037 n.1 (1993).

judgment attributable to improper expenditures from one of the funds. See *ibid.* In an unpublished order, the court of appeals affirmed. Pet. App. 2a-3a.

1. a. Petitioner, along with another Indian tribe, filed its first amended petition before the Indian Claims Commission on October 18, 1950. Pet. App. 16a. The Claims Commission assigned the petition Docket No. 22, and eventually subdivided the docket into a number of cases. *Ibid.* Docket No. 22-D involved petitioner's claim that the United States had not compensated petitioner for the taking of its aboriginal lands lying outside of its reservation. In an interlocutory decision, the Claims Commission found that the government was responsible for taking those lands. *San Carlos Apache Tribe* v. *United States*, 21 Ind. Cl. Comm'n 189 (1969) (*reprinted* in part at Pet. App. 71a-76a). Petitioner and the United States subsequently entered into a settlement of that claim. *San Carlos Apache Tribe of Indians* v. *United States*, 28 Ind. Cl. Comm'n 399 (1972) (*reprinted* in part at Pet. App. 87a-94a). The settlement provided,

> Entry of Final Judgment in said amount shall finally dispose of all rights, claims or demands which the plaintiffs have asserted or could have asserted with respect to the subject matter of this suit, [Docket No. 22-D,] and plaintiffs shall be barred thereby from asserting any such rights, claims or demands against defendant in any other or future action.

28 Ind. Cl. Comm'n at 404. Petitioner settled its claim against the United States for $4.9 million, and the Claims Commission entered a final judgment against the United States in that amount. *Id.* at 419.

b. The background of the claim that petitioner brings here is as follows: In 1887, C.H. Wallace of the General Land Office surveyed the northern boundary of

petitioner's reservation; the General Land Office accepted the Wallace survey in 1888. See Pet. App. 81a. In 1967, before the settlement in Docket No. 22-D, the Secretary of the Interior rejected a request for a resurvey of the boundary, finding no gross error requiring resurvey. *Id.* at 80a-86a. Petitioner did not seek judicial review of that decision. In 1984, however, petitioner sued federal officials in federal district court to quiet title to the disputed lands, claiming that these lands lie inside the boundaries of petitioner's reservation. In that case, the district court held that the settlement in Docket No. 22-D precluded relitigation of the boundary issue, and the court of appeals affirmed. See *White Mountain Apache Tribe* v. *Clark*, 604 F. Supp. 185 (D. Ariz. 1984), aff'd *sub nom. White Mountain Apache Tribe* v. *Hodel*, 784 F.2d 921, 926 (9th Cir.), cert. denied, 479 U.S. 1006 (1986).[3]

Having failed to quiet title to the disputed land in that manner, petitioner sought to amend the 1972 consent judgment in Docket No. 22-D. In 1987, in the course of proceedings in Docket No. 22-H, petitioner filed a motion to amend the judgment in Docket No. 22-D. In support of that motion, petitioner claimed that its former attorneys in Docket No. 22-D misled petitioner as to the effect of the 1972 judgment and that the trial court should modify the 1972 judgment because petitioner was a victim of fraud. The United States argued that the motion was

[3] Petitioner's claim concerning the amount of land affected by the survey has gradually increased through the years. In 1967, it appeared that 12,000 acres were at issue. See Pet. App. 80a. By the time of the Arizona litigation, the amount was 14,000 acres. See *White Mountain Apache Tribe* v. *Clark*, 604 F. Supp. at 187. Petitioner raised its claim below to 16,000 acres. See Pet. App. 109a. Petitioner now claims that the Wallace survey deprived it of 16,090 acres. Pet. 19.

untimely because the current claims attorney had known about the alleged fraud since 1983, but did not move for relief from the judgment until 1986. C.A. App. 204. In addition, the government argued that petitioner had not met the burden for relieving petitioner of the consent judgment in Docket No. 22-D. *Id.* at 205-208. The trial court denied petitioner's motion, adopting the government's memorandum as the basis for its decision. Pet. App. 5a-6a. Petitioner attempted several interlocutory appeals of that decision, all of which the court of appeals dismissed for lack of jurisdiction. See, *e.g.*, *id.* at 95a, 101a.

2. The claims in Docket No. 22-H alleged resource mismanagement. Those claims eventually went to trial in 1987.[4] At trial, petitioner presented evidence that the United States had mismanaged petitioner's rangelands. Petitioner contended that the United States permitted overstocking and overgrazing on those lands, which caused erosion and reduced the carrying capacity of the rangelands. Pet. App. 26a.

[4] In 1980, petitioner and the United States had reached a proposed settlement in which the United States agreed to pay petitioner $13 million for all claims raised in Docket No. 22-H. See 6 Cl. Ct. at 585. Petitioner rejected the proposed settlement, *id.* at 584, and then caused further delay by refusing to obey certain orders of the trial court. See 4 Cl. Ct. at 576. As a sanction, the trial court dismissed petitioner's case with prejudice. 6 Cl. Ct. at 578-583. To soften this blow, the trial court entered a judgment in petitioner's favor for $10 million, which represented approximately three-quarters of the settlement offer that the United States had made in 1980. *Id.* at 585. Both parties appealed. In an unpublished order, the court of appeals reversed the trial court's dismissal and vacated the judgment entered against the United States. *White Mountain Apache Tribe* v. *United States*, 776 F.2d 1063 (Fed. Cir. 1985) (Table).

The trial court found that the United States had a fiduciary obligation to petitioner with respect to its rangelands. The fiduciary relationship arose because the United States

> established a program of leasing grazing land under permits to non-Indian livestock owners. It was under no obligation to do so. But having undertaken to administer this program, the Government was obligated to act in a fiduciary capacity toward those lands.

Pet. App. 26a-27a. The trial court also found that the government's "careless administration" allowed petitioner's rangelands to become overstocked and overgrazed. *Id.* at 31a.

While petitioner contended that the overgrazing caused all of the erosion on its rangelands, Pet. App. 34a-35a, the government "attribute[d] the cause [of erosion] to wholly natural climatic forces operative throughout the Southwest generally." *Id.* at 34a. The trial court determined that

> neither climate nor overgrazing was the sole cause of accelerated erosion on the reservation, but rather that the overgrazed condition of the reservation's rangeland predisposed it to the erosive forces of the climate, ultimately resulting in the damaged and eroded condition that persists today. Since the Government initiated and condoned the stocking conditions that produced overgrazed rangeland, in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted.

Id. at 46a (emphasis omitted).[5] The trial court tempered this finding by holding that the government was not responsible for all erosion that occurred on the Reservation, because some erosion could be attributed to climate. *Id.* at 47a.

In determining the amount of damages, the trial court balanced the parties' differing approaches to damages. See Pet. App. 55a. The trial court rejected petitioner's proposed measure of restoration costs, *id.* at 56a; see also 10 Cl. Ct. at 117-118, and instead determined the diminution in the market value of the Reservation. Pet. App. 56a. After reviewing various methods to determine that diminution, the trial court settled on the approach of the government's expert, whose testimony it found "especially persuasive." *Id.* at 58a. The trial court began with a potential leasing value of the Reservation if left pristine, deducted the amount that petitioner actually received from grazing permittees, and added the "capitalized amount of the reduced range value." *Id.* at 60a. The trial court adjusted its calculation of the current carrying capacity of the rangelands upward to reflect the amount of damage caused by climate instead of overgrazing, and added some damages to reflect lease revenue that petitioner might have received if the rangelands had not been overgrazed. Based on these calculations, the court awarded $3,627,000 to petitioner on its rangeland mismanagement claim, which included damages for the resulting erosion to petitioner's rangelands. *Id.* at 61a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 2a-3a. Finding the trial court's opinions to

[5] The emphasis that appears in the petitioner's appendix does not appear in the opinion as reported in the Claims Court Reporter. See 11 Cl. Ct. at 659.

be "thorough and exhaustive," *id.* at 3a, the court of appeals held that the trial court "correctly rejected each of [petitioner's] remaining claims to damages and, in doing so, has properly considered, analyzed and rejected all further arguments that [petitioner] has put forth in support of such claims." *Ibid.* The court of appeals also noted that petitioner had mentioned "in its statement of the facts" the dispute over the alleged missurvey of the northern boundary of petitioner's reservation. *Id.* at 3a n.2. The court of appeals did not consider that argument, however, because petitioner "ha[d] not presented any argument on appeal concerning this claim and the government persuasively explained that it was resolved and subsumed in other proceedings." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The first question petitioner raises was waived below. The court of appeals noted in its unpublished opinion that petitioner asserted "in its statement of the facts" that the United States had deprived it of the disputed 16,000 acres through an incorrect survey. Pet. App. 3a n.2. The court noted, however, that petitioner had not "presented any argument on appeal concerning this claim." *Ibid*; see also *id.* at 109a-112a. Because petitioner never supplied that court with any reason to reverse the trial court on the issue, the court of appeals never passed on it. As a general rule, this Court will not review issues that the court below has not passed upon. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113

S. Ct. 2462, 2466 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[6]

In any event, petitioner's claim is without merit. In the trial court, petitioner moved to amend the judgment in Docket No. 22-D. The trial court's denial of that motion is reviewed only for an abuse of discretion. The judgment in Docket No. 22-D extinguished any claim that petitioner had to the disputed 16,000 acres.[7] Petitioner had previously sought to quiet title to the disputed lands in *White Mountain Apache Tribe* v. *Clark*, 604 F. Supp. 185 (D. Ariz. 1984). The district court held in that case that "[t]he Indian Claims Commission did rule that there had been a taking of all lands lying outside of the boundary of the reservation. That boundary *is* the Wallace Survey boundary." *Id.* at 188 (citation omitted). The Ninth Circuit affirmed that holding. *White Mountain Apache Tribe* v. *Hodel*, 784 F.2d 921, 926, cert. denied, 479 U.S. 1006 (1986).[8]

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[6] Petitioner argues that the courts below denied it "judicial due process" (Pet. 27) because they assertedly denied petitioner "its right to be heard" regarding the disputed parcels. Pet. 29. Petitioner had an opportunity to be heard by the trial court; that court simply rejected petitioner's contentions. Petitioner also had an opportunity to be heard in the court of appeals when it appealed the final judgment in this case; petitioner simply failed to avail itself of that opportunity.

[7] Petitioner's former claims attorney filed a brief as *amicus curiae* in the court of appeals arguing that the judgment in Docket No. 22-D did not extinguish title to the disputed lands. The litigation in the Ninth Circuit construed the 1972 consent judgment differently, however, and found that it had extinguished petitioner's claim to title.

[8] Petitioner wrongly asserts (Pet. 28-29) that the United States cannot rely on the preclusive effects of the Ninth Circuit's judgment because the United States was not a party to that litigation. Petitioner sought to quiet title to land that the United States owns,

2. Petitioner also contends (Pet. 23-27) that the trial court refused to award petitioner damages for erosion that took place on its Reservation. In Indian claims cases in which a Tribe claims damages like those at issue here, the Tribe is awarded damages in an amount equal to the diminution in the value of its reservation. See, *e.g.*, *Gila River Pima-Maricopa Indian Community* v. *United States*, 467 F.2d 1351, 1357 (Ct. Cl. 1972). Petitioner does not question that rule. Petitioner claims only that the trial court awarded petitioner too little in damages as a factual matter. Specifically, petitioner complains that the trial court did not adopt its expert's opinion on the issue of damages. That claim has no merit, and does not warrant this Court's review.

The trial court found the approach of the government's expert "especially persuasive." Pet. App. 58a. Petitioner had every opportunity to present its own evidence and its experts' reports to the trial court. That court simply found other evidence more persuasive. The determination of weight accorded to evidence lies within the province of the factfinder, not a reviewing court. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). The trial court determined the amount of damages on the

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and it brought suit against federal officers; the United States was the real party in interest in that litigation. Petitioner had a full and fair opportunity to litigate the title issue, and it should be precluded from relitigating it. See *Montana* v. *United States* 440 U.S. 147, 153-154 (1979); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971). In any event, even if the United States could not rely on the preclusive effect of the judgment in the quiet title action, the trial court did not abuse its discretion in refusing to modify the judgment in Docket No. 22-D.

basis of its weighing of the evidence, Pet. App. 61a,[9] and the court of appeals affirmed that factual determination. *Id.* at 3a. This Court should not depart from its usual practice of declining to review findings of fact concurred in by both courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1994

[9] The trial court awarded petitioner $3,627,000 in damages to compensate petitioner for damage to its rangelands. Pet. App. 61a. As a factual matter, that amount includes damages for erosion. The trial court is not obligated to specify the precise amount of damages attributable to erosion.

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IN THE

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OCTOBER TERM, 1993

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BY PETITIONER WHITE MOUNTAIN APACHE TRIBE TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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INTRODUCTION

Error pervades all aspects of the brief filed by the United States in Opposition to the Petition for a Writ of Certiorari, filed here by the White Mountain Apache Tribe.

Contrary to Trustee's Contentions, the 16,000 Acres Here Involved Are and Have Always Been Within Tribe's Reservation

(1) To end the costly and protracted war with the Western Apaches, which includes the Petitioner Tribe, the United States Trustee, by the Executive Orders of November 9, 1871 and December 14, 1872, carved from Petitioner Tribe's ancient ancestral homeland the White Mountain Apache Indian Reservation. Among other things the United States, in establishing the boundaries of Petitioner Tribe's Reservation, designated "... the south edge of the Black Mesa" to be the Northern Boundary of Tribe's Reservation.[1]

(2) The Indian Claims Commission found as a fact:

> ... that May 1, 1873, marks the date on which the United States *took from the Western Apache Indians their Indian title to all of their aboriginal lands located outside of the boundaries of the reservation established by the Executive Orders of November 9, 1871 and December 14, 1872.*[2]

The Trustee's erroneous Wallace Survey was not conducted until 1887, fifteen years subsequent to the inclusion of the 16,000 acres of land within Tribe's Reservation.[3]

(3) Petitioner White Mountain Apache Tribe and the United States Trustee entered into the Compromise Settlement dated September 12, 1972.[4] They agreed that the

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[1] Petition, p. 6-9; Appendix p. 67a, 78a; Appendix 3, Affidavit of Elmer M. Clark, pgs. 8a-9a.

[2] Appendix 6, Indian Claims Decision, June 27, 1969, Finding No. 12, p. 75-a. (Emphasis supplied)

[3] *Ibid.*

[4] Petition, p. 11.

Trustee had taken "all" of Petitioner's Tribe's ". . . aboriginal lands located *outside of the boundaries of the Reservation established by the Executive Orders of November 9, 1871 and December 14, 1872,*"[5]

(4) The 16,000 acres were "*not outside*" of Tribe's Reservation when it was created.[6]

(5) Today, those 16,000 acres of Petitioner Tribe's lands are illegally occupied by agents of the United States Trustee[7] for the benefit of the Trustee to Petitioner Tribe's continuing irreparable damage.[8]

(6) The Court and lower courts have repeatedly declared that:

> The general rule, is that in matters of boundaries calls for natural objects and fixed monuments control those for distances.[9]

The Court and the lower courts have likewise repeatedly declared as a matter of law that:

> The United States 'could not . . . by an incorrect survey deprive the Indians of the right of occupation of

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[5] Petition, pgs. 8-9, 11; Appendix 5, p. 67, Executive Order of November 9, 1871; Appendix 7, p. 78-a, Executive Order of December 14, 1872; Appendix 6, p. 75-a, 21 Ind.Cl.Comm, 189 (1969), Finding 12. (Emphasis Supplied); *see* Petition, p. 11.

[6] Petition, p. 8-10.

[7] *Ibid.*

[8] Petition, pgs. 8, 9.

[9] Petition, p. 20; *see Sekaquaptewa v. McDonald*, 626 F.2nd 113, 118, (CA 9, 1980); *See* also *United States v. Romaine*, 255 F.253, 260 (CA 9, 1919); *United States v. Stotts*, 49 F.2d 619, 620 (U.S.D.C.W.D. Wash. 1930); *see* Vol. 6, Commentaries on the Modern Law of Real Property, p. 571, in which it is declared, Skec. 3044, "Superiority of Calls to Monuments . . . . A 'monument' is a tangible landmark, and monuments as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary. . . ." *See Tiffany, Law of Real Property*, 3rd Ed., p. 430, 514; Vol. 6, Thompson Real Property, p. 576.

the land within the legal boundaries of the Reservation.'[10]

Predicated upon those undenied and undeniable facts and controlling principles of law, Petitioner White Mountain Apache Tribe has repeatedly, without success, attempted to be heard by a court of competent jurisdiction with the objective of having the possession of the 16,000 acres restored to it.

ERRORS STRIP ALL MEANING FROM QUESTION NO. 1 PRESENTED IN TRUSTEE'S BRIEF IN OPPOSITION[11]

The inceptive error in Question No. 1 of the Brief in Opposition, which is quoted below, is the statement that the lands here involved—the 16,000 acres of land—were part of the aboriginal lands of Petitioner Tribe "lying outside of the boundaries" of Tribe's Reservation, title to which was in fact extinguished.[12] The 16,000 acres which Plaintiff Tribe seeks by these proceedings to recover are today "*within*" Tribe's Reservation.[13] The only lands, title to which was extinguished by the United States Trustee, were lands "*outside*" the boundaries of Tribe's Reservation when it was created in 1871.

Those agents of the Trustee are likewise fully aware of the controlling precepts of the law that an erroneous survey (1) cannot change a boundary that was created by a designated natural monument, as here, the south edge of the Black Mesa; and (2) that an erroneous survey will not deprive the Petitioner White Mountain Apache Tribe of

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[10] Petition, pgs. 21-22 and cited authorities; see also *Northern Pacific Ry. Co. v. United States*, 191 F. 947, 958 (1911); see also *Northern Pacific R.R. Co. v. United States*, 227 U.S. 355, 366 (1913).

[11] Brief of the United States and Opposition, p.1. Question No. 1. Whether the trial court abused its discretion in refusing to reopen a 15-year-old judgment that extinguished the petitioner Indian Tribe's aboriginal title to land lying outside of the boundaries of its Reservation?

[12] *Supra.*, pgs. 1-2, para. 1-5.

[13] *Ibid.*

its lands within the legal boundaries of its Reservation. It is on the background of those facts and principles of law that reference is now made to the other illogical arguments that the Trustee, not the Tribe, has title to the 16,000 acres.

PRINCIPLES OF COLLATERAL ESTOPPEL–PRECLUSION–HAVE NO APPLICATION HERE

Repeatedly, the Trustee United States has asserted in error that Petitioner Tribe had an opportunity to be heard respecting its title to the 16,000 acres. That statement is contrary to fact. Never at any time has the Tribe been permitted to establish the facts set forth in Tribe's Petition and in this Reply. The "trial court" simply refused to hear the Tribe's case, agreeing only to permit the Tribe to place into the record the affidavit of Tribe's Professional Surveyor.[14] The issue was explicitly presented to the Court of Appeals for the Federal Circuit in Petitioner Tribe's Brief and the arguments presented there were totally ignored by that Court except for its declaration that ". . . the government had persuasively explained" that the Tribe's claims to the 16,000 acres had been "resolved and subsumed" in other proceedings.[15] It is an incongruity for the Trustee to state that the matter was not presented to the Court below when that court declared the "government persuasively explained" [albeit in total error] that it [Tribe's claim] was resolved and subsumed in other proceedings."[16]

As reviewed and documented in both Tribe's Petition and in this Reply, title has always remained in Petitioner Tribe and the Tribe is entitled to be heard in a court of competent jurisdiction to refute the erroneous claims of

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[14] Appendix 3, p. 7a.

[15] Petition, p. 12-14.

[16] *Ibid.*, neither *Zobrest v. Catalina . . . School District*, 113 S.Ct. 2462 (1993); nor *Adickes v. Kress*, 398 U.S. 144 (1970), referring to a "general rule" have application here.

the agents of the Trustee which can only be accomplished by a mandate from this Court.[17]

The Trustee, repeating its grossly erroneous charges contained in its Question No. 1, makes this statement:

> The judgment in Docket No. 22-D extinguished any claim that petitioner had to the disputed 16,000 acres.[18]

It is impossible to perceive why the Trustee continues to deny the undeniable fact that the 16,000 acres[19] are south of the south edge of the Black Mesa within Tribe's Reservation.[20] The Trustee has taken cognizance of the fact that only the lands outside of Tribe's Reservation were extinguished. That concept arises from the fact that the Trustee now asserts that, in some fashion, the Tribe was deprived of its title by the case of *White Mountain Apache Tribe v. Clark.*[21] That conclusion respecting the Trustee's thinking is predicated upon a reference presented in the Brief in Opposition by way of a footnote. That statement, albeit cryptic, is quoted in full. "The litigation [sic] in the Ninth Circuit construed the 1972 consent judgment differently, however, and found that it had extinguished petitioner's claim to title."[22] To clarify that statement, reference is made to the nature and objective of Petitioner Tribe's case against the then Secretary of the Interior *Clark*—later *Hodel.* In that case the Tribe relied upon the hallmark decisions of *Land v. Dollar*[23] and *United States v. Lee.*[24] In *Land v. Dollar,* it was explained that the case

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[17] *Supra.*, p. 1-2, pp. 1-5.

[18] *Supra.*, pgs. 4-5.

[19] *Supra.*, pg. 3.

[20] *Ibid.,1-5.*

[21] 604 F. Supp. 185 (U.S.D.C.DK.Ariz. 1984); *White Mountain Apache Tribe v. Hodel,* 784 F.2nd 921, 922 *cert. den.* 479 U.S. 1006 (1986).

[22] Brief of the United States in Opposition, p. 9, para. 7.

[23] 330 U.S. 731, 736-738 (1947).

[24] 106 U.S. 196 (1882).

of *United States v. Lee* involved an action of ejectment to recover possession of a tract of land. That was precisely the objective of the case of *White Mountain Apache Tribe v. Clark.*

The Court, in *Land v. Dollar* emphasized that the action in *United States v. Lee* was not "an adjudication" that would be *res judicata* "against the United States because it cannot be made a party to the suit. . . ."[25] The Court then added ". . . that an agent or officer of the United States who acts beyond his authority is answerable for his actions."[26] Further, by way of explanation respecting the character of the *Clark* case, this quotation from *Land v. Dollar* is most significant: ". . . public officials may become tort-feasors . . ."[27] and "[t]he dominant interest of the sovereign [when the case of the nature of Clark has been instituted] is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."[28]

Continuing to cite the *Clark* and *Hodel* cases—which are totally irrelevant in these proceedings—the Trustee quotes this excerpt from the *Clark* Decision.

> The Indian Claim Commission did rule that there had been a taking of all lands *lying outside of the boundary of the reservation.*[29] That boundary *is* the Wallace Survey Boundary.[30]

That last-quoted excerpt is diametrically opposed to the judgment in Docket 22-D. There, it is stated that ". . . *the Western Apache aboriginal title to lands outside of the White Mountain Apache Indian Reservation . . . was ex-*

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[25] *Ibid.*, p. 736.

[26] *Ibid.*

[27] *Ibid.*, p. 738.

[28] *Ibid.; See* also *Mine Safety Co. v. Forrestal*, 326 U.S. 371 (1945); *See* also Ex-parte New York, 256 U.S. 490, 500, 502 (1921).

[29] Brief in Opposition, p. 9.

[30] *Ibid.*

tinguished by the United States on May 1, 1873, without the payment of compensation.[31]

It is irresponsible for the Trustee to assert that the Wallace Survey Boundary could alter or change the Executive Orders of 1871 and 1872, both of which declared that the Northern Boundary of Petitioner Tribe's Reservation was and is "the south edge of the Black Mesa."[32]

Continuing to refer to the *Clark* and *Hodel* Decisions, the Trustee in its Brief in Opposition, again by way of footnote, declares that Petitioner Tribe had wrongly asserted that the United States cannot rely ". . . on the preclusive effects of the Ninth Circuit's judgment because the United States was not a party to that litigation." Thereafter, the United States Trustee declares—in error—that Petitioner Tribe sought to quiet title to lands that the United States owns. That statement is totally in error. The action, as emphasized above in *White Mountain Apache Tribe v. Clark,* did not involve lands owned by the United States.

It is then asserted contrary to fact that ". . . the United States was the real party in interest in that litigation [*White Mountain Apache Tribe v. Clark*]."[33] Thereafter and again contrary to fact, the Trustee asserts that the Tribe had ". . . a full and fair opportunity to litigate the title issue. . . ." That statement is again grossly in error. There was no conceivable means pursuant to which the Tribe could have a full and fair opportunity to litigate title to the 16,000 acres when it was proceeding against Secretary Clark as an individual acting beyond the scope of his official authority. Having made the unreasonable and totally erroneous statement, the Trustee concludes that the White Mountain Apache Tribe ". . . should be precluded from relitigating . . ." the title issue as it pertains to the 16,000 acres. Continuing in error, the Trustee cites the case of

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[31] Appendix 10, pgs. 87-a, 88-a.

[32] *See* above pages 1-2, para. 1-5.

[33] Brief in Opposition, p. 9-10, ftn. 8.

Montana v. United States.[34] The express language and rationale of the *Montana* Decision refutes and completely rejects the arguments presented here by the Trustee. That language is as follows:

> . . . A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . *cannot be disputed in a subsequent suit between the same parties or their privies . . .*'[35]

Most assuredly, the United States was not a party to the case of *White Mountain Apache Tribe v. Clark*, nor was there anyone in the *Clark* litigation in privy with the United States.

The other cases cited by the Trustee, in addition to *Montana*, are inapplicable to these proceedings for precisely the same reasons as expressed above.[36]

In *Moore's* indepth analysis of "Effect of Participation in Litigation by Non-party"[37] there is reviewed and documented in detail the total futility of the Trustee's efforts to declare that the judgment in the *Clark* and *Hodel* cases would have a preclusive effect upon the claims of Petitioner Tribe that holds title to the 16,000 acres which lie within its Reservation. Petitioner Tribe claims that it could not be deprived of the 16,000 acres by the Trustee's erroneous survey.[38]

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[34] 440 U.S. 147, 153-154 (1979).

[35] *Ibid.* (Emphasis supplied).

[36] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories Inc. v. United States of Illinois Foundation*, 402 U.S. 313, 328-329 (1971).

[37] Vol. 1B, *Moore's Federal Practice, Sec.* 0411[6], p. 111-246, *et seq.*

[38] Petition, p. 22.

As reviewed and fully documented above, neither the *Clark* or *Hodel* case has "resolved or subsumed" the issues which Petitioner Tribe requests this Court to hear.[39]

FAILURE OF THE TRUSTEE TO RESPOND TO TRIBE'S CHARGES THAT ALTHOUGH TRUSTEE WAS HELD LIABLE FOR ACCELERATED EROSION TRIBE WAS NOT AWARDED DAMAGES

As it has throughout its brief, the Trustee misstates the issues presented by Petitioner Tribe. With full documentation, Petitioner Tribe established the fact that the trial court found that ". . . the Government . . . must be held liable for the accelerated erosion. . . ."[40] No mention is made by the Trustee of the fact that the trial court had held the Government liable for the accelerated erosion. Mention is made that erosion had occurred and the carrying capacity of the rangeland had been reduced.[41] It is also stated, in total error, that "Petitioner claims only that the trial court awarded too little in damages as a factual matter."[42] It is then stated that the damages that were awarded included damages for erosion, citing Appendix 61a. It is to be observed that there is no reference on the cited appendix page to accelerated erosion, or the damages sustained by Petitioner Tribe from that accelerated erosion. The only reference made by the court in its final opinion is for ". . . mismanaging Tribe's range and forest resources."[43] Again no mention of accelerated erosion. As urged in Tribe's Petition, the accelerated erosion has "caused irreparable damage" to approximately 427,811 acres of land within Tribe's Reservation.[44]

Ignored likewise by the Trustee in its response is the fact that the agricultural products of the Indians have been

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[39] Petition, p. 12-13.

[40] Petition, p. 14.

[41] Brief in Opposition, p. 5, para. 2.

[42] *Ibid.*, p. 10-11.

[43] Appendix 4, p. 65a.

[44] Petition, p. 17.

reduced far over 50 percent due to the erosion which has destroyed "the agricultural lands along the streambeds. . . ."[45] Reference is also made to the findings by the trial court that the accelerated erosion by "gouging the streambeds to levels below many of the existing irrigation channels" depriving the Apaches of their systems of irrigation with the attendant loss of a substantial share of their food supply.[46]

The Court is requested to remand the issue of damages for accelerated erosion to the Court of Federal Claims requiring that Court specifically to assess the damages and to make an appropriate award to the Tribe commensurate with the losses it has sustained.

WHEREFORE, PETITIONER WHITE MOUNTAIN APACHE TRIBE renews its request as set forth in its petition for a writ of certiorari that the Court grant Petitioner Tribe its Constitutional right to judicial due process—its right to be heard relative to both its claim to title to the 16,000 acres and for damages commensurate with the losses it has sustained due to the ongoing accelerated erosion.

Respectfuly submitted,

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Dated: April 12, 1994

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[45] *Ibid.*, p. 15.

[46] *Ibid.*,